

# Notes

## **“Objectivity and Balance” in Public Broadcasting: Unwise, Unworkable, and Unconstitutional**

Steven D. Zansberg<sup>†</sup>

This debate will not be about censorship. I, for one, do not want to control television programming, but we should make certain the American taxpayers are getting what they are paying for, and not getting what their tax dollars should not be paying for.

-Sen. Robert Dole (R-Kansas)<sup>1</sup>

If we start coming into this chamber and seeking to review the editorial decisions made by those who decide what programming goes on, then it will not be long before we are seeing the rightwing insist that Mr. Rogers change his lesson plan to include a rightwing political agenda in “Mister Rogers’ Neighborhood,” or that “Sesame Street” come up with different characters because they did not meet the political or ideological litmus test.

-(then) Sen. Albert Gore (D-Tenn.)<sup>2</sup>

In the Spring of 1992, Congress debated whether to reauthorize funds for the Corporation for Public Broadcasting (the CPB).<sup>3</sup> Congress had created the CPB, a private, nonprofit corporation, in 1967, as the mechanism to disburse federal funds to public broadcasting stations and program producers, and as a buffer or “heat shield” between Congress and the public broadcasters. In 1992, conservatives extended the “culture war” they had earlier declared against public funding for the arts,<sup>4</sup> and launched a full frontal assault upon public broadcasting,<sup>5</sup> seeking to withdraw all federal support for the CPB.<sup>6</sup> Opponents of public broadcasting leveled four charges against the institution:

---

<sup>†</sup> A shorter version of this Note received first prize in the 1994 Stephen G. Thompson Memorial Writing Competition in Communications Law at the Columbus School of Law at Catholic University of America. The author is grateful to Professor Owen M. Fiss for his thoughtful comments and suggestions for improving this Note.

1. 138 CONG. REC. S2645 (daily ed. Mar. 3, 1992).

2. *Id.* at S2649.

3. 138 CONG. REC. S7425-64 (daily ed. June 3, 1992) (discussing the Public Telecommunications Act of 1991, H.R. 2977); 138 CONG. REC. S7304-47 (daily ed. June 2, 1992).

4. For a discussion of the rightwing “culture war,” see John O’Connor, *For the Right, TV is Half the Battle*, N.Y. TIMES, June 14, 1992, at B2; Dennis Wharton, *Right Winger Zinger in Senate*, VARIETY, Mar. 9, 1992, at 32.

5. See *Nightline: Conservatives Trying to Kill Off Public Broadcasting* (ABC television broadcast, May 12, 1992) (transcript available in LEXIS, Nexis Library, Script File) (debate between Bill Moyers and George Will over the continuing need for government funding for public television); Walter Goodman, *In the Debate Over PBS, The Subject is Objectivity*, N.Y. TIMES, June 3, 1992, at C20; Laurie Ouelette, *The Right Wing Targets Public TV: Jesse Helms vs. Bill Moyers*, UTNE READER, May-June 1992, at 45; Richard Zoglin, *Public TV Under Assault*, TIME, Mar. 30, 1992, at 58.

6. 138 CONG. REC. H288 (daily ed. Feb. 4, 1992) (Rep. Armey joining as cosponsor of H.R. 3616); 137 CONG. REC. H8334 (daily ed. Oct. 23, 1991) (Rep. Crane offering H.R. 3616, a bill to repeal the statutory authority for the CPB).

## “Objectivity and Balance” in Public Broadcasting

(1) that public television had been rendered obsolete by the explosion of cable channels offering programming traditionally found on PBS; (2) that in an age of budgetary constraint, it was indefensible to expend federal funds on a system that served mostly elitist preferences; (3) that programming on public broadcasting stations was frequently “indecent,” and such programming should not be paid for with tax revenues; and (4) that public affairs programming on public broadcasting stations evinced a consistently liberal bias.<sup>7</sup> By far the most sustained criticism of public broadcasting focused on the alleged liberal bias of news and information programming. During the floor debates, several congressmen ridiculed specific programming choices of public television officials<sup>8</sup> and accused public broadcasting of promoting a “left-wing ideology.”<sup>9</sup> Typical of this sentiment was the opinion expressed by Senate Minority Leader Robert Dole (R-Kansas), that public television presented a “steady stream of documentary cheerleading for leftwing interests.”<sup>10</sup>

Ultimately, in August 1992, Congress voted to reauthorize funding for the CPB for three years.<sup>11</sup> However, the harsh criticism from conservative members of Congress<sup>12</sup> cast a pall over the proceedings, and resulted in an amendment to the reauthorization legislation that requires the CPB to monitor and ensure that national programming on public broadcasting stations is “balanced”

---

7. See Charles. S. Clark, *Public Broadcasting: Will Political Attacks and New Technologies Force Big Changes?*, 2 CQ RESEARCHER 809, 811 (Sept. 18, 1992) (“public broadcasting was variously labeled ‘an upper-middle-class entitlement program,’ ‘a government frill we can no longer afford,’ and a liberal mouthpiece for promoters of homosexuality.”).

8. See, e.g., 138 CONG. REC. S2650 (daily ed. Mar. 3, 1992) (statement of Sen. McCain) (criticizing three PBS programs, *Tongues Untied*, *Maria’s Story*, and *After the Warming* as “liberal, leftwing programs”); *id.* at S7430 (daily ed. June 3, 1992) (statement of Sen. Dole) (calling *Listening to America* with Bill Moyers unbalanced propaganda).

9. 138 CONG. REC. S7430-41 (daily ed. June 3, 1992) (statement of Sen. Dole); see also 138 CONG. REC. S2645 (daily ed. Mar. 3, 1992) (statement of Sen. Dole) (attacking “unrelenting liberal cheerleading”); *id.* at S2650 (statement of Sen. McCain) (“[T]he viewer is predominantly exposed to liberal, leftwing viewpoints without the benefit of alternative points of view.”).

Senator Dole also referred to a report produced by the Center for Media and Public Affairs which had reviewed 225 PBS documentaries, finding that the documentaries “lack ideological balance, and [that the] balance of opinion . . . consistently favored liberal positions.” *Id.* at S7430. See generally S. ROBERT LICHTER ET AL., CENTER FOR MEDIA AND PUBLIC AFFAIRS, *BALANCE AND DIVERSITY OF PBS DOCUMENTARIES* (1992).

10. 138 CONG. REC. S7434 (daily ed. June 3, 1992); see also *id.* at S7433 (statement of Sen. Dole) (“Let us look at what the American people are watching . . . They are watching a one-sided, leftist, tilted program.”). But see *id.* at S7444 (statement of Sen. Hatch) (arguing that controversial programs on public broadcasting are the exception, not the rule, and funding should not be denied on that basis).

11. Congress has authorized for the CPB \$310 million in fiscal year 1994, \$375 million in fiscal year 1995, and \$425 million in fiscal year 1996. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 8, 106 Stat. 951.

12. Conservative criticism of public broadcasting was not limited to the congressional forum. For example, at the Republican National Convention in Houston in August 1992, delegates approved a platform with language deploring “the blatant political bias of the government-sponsored radio and television networks,” and looking “forward to the day when public broadcasting is self-sufficient.” Clark, *supra* note 7, at 826.

and "objective."<sup>13</sup> Under the amendment, the CPB is required to report annually to Congress on its policy and procedures for evaluating and promoting objectivity and balance.<sup>14</sup>

Not surprisingly, the acrimonious legislative battle and resulting "objectivity and balance" amendment produced a dramatic chilling effect. The CPB has already signaled its intention to avoid further political battles by curtailing the coverage of controversial programming on public broadcasting stations. In May 1993, the CPB sent letters to public radio broadcasters urging them to publicize a new national toll free telephone comment line, because "[n]egative comments might vindicate a station's decision not to carry controversial programming."<sup>15</sup> Furthermore, critics of public broadcasting have pointed to the Public Broadcasting Service's (PBS) refusal to air a number of documentaries critical of corporate America as a logical and foreseeable response to the 1992 congressional wrangling.<sup>16</sup>

---

13. Pub. L. 102-356, § 19, 106 Stat. 949, 955-56 (1992). The stated purpose of the amendment was "to promote programming objectivity and balance." 138 CONG. REC. S7341 (daily ed. June 2, 1992) (statement of Sen. Inouye) (introducing amendment for floor debate). The text of the amendment reads in pertinent part:

Pursuant to the existing responsibility of the Corporation for Public Broadcasting under section 396(g)(1)(A) of the Communications Act of 1934 (47 U.S.C. 396(g)(1)(A)) "to facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature," the Board of Directors of the Corporation shall:

- (1) review the Corporation's existing efforts to meet its responsibility under section 396(g)(1)(A);
- (2) after soliciting the views of the public, establish a comprehensive policy and set of procedures to—
  - (A) provide reasonable opportunity for the members of the public to present comments to the Board regarding quality, diversity, creativity, excellence, innovation, objectivity and balance of public broadcasting services, including public broadcasting of a controversial nature, as well as any needs not met by those services;
  - (B) review, on a regular basis, national public broadcasting programming for quality, diversity, creativity, excellence, innovation, objectivity, and balance, as well as for any needs not met by such programming;
  - (C) on the basis of information received through such comment and review, take such steps in awarding programming grants . . . that it finds necessary to meet the Corporation's responsibility under section 396(g)(1)(A), including facilitating objectivity and balance in programming of a controversial nature; and
  - (D) disseminate among public broadcasting entities information about its efforts to address concerns about objectivity and balance relating to programming of a controversial nature so that such entities can utilize the Corporation's experience in addressing such concerns within their own operation; and

- (3) starting in 1993, by January 31 of each year, prepare and submit to the President for transmittal to the Congress a report summarizing its efforts pursuant to paragraphs (1) and (2).

14. Pub. L. 102-356, §19, 106 Stat. 949, 955-56 (1992). After receiving a one-year extension, the CPB delivered its first report on "objectivity and balance" to Congress on January 31, 1994.

15. Sandy Tolan, *Dial 1-800-CENSOR*, N.Y. TIMES, May 5, 1993, at A21.

16. See Kurt Andersen, *How Necessary is PBS?*, TIME, July 26, 1993, at 75 (describing cancellation of PBS programs that are considered innovative or outside the mainstream); Daniel Cerone, *Group Protests PBS "Self-Censorship"*, L.A. TIMES, Jan. 7, 1993, at F11; Elliott M. Minceberg & Sonia Bacchus, "Objectivity and Balance" in *Public Broadcasting*, LEGAL TIMES, May 17, 1993, at 34 (describing how critics of PBS contend that refusal to air certain documentaries was "the result of the same pressures that led to the 1992 reauthorization amendment"); *PBS Rejection of Anti-Nuke Documentaries Spurs Hollywood to Coalesce*, PUB. BROADCASTING REP., Dec. 4, 1992 (describing formation of The Coalition Versus PBS).

## “Objectivity and Balance” in Public Broadcasting

This Note argues that the 1992 “objectivity and balance” amendment is unworkable, unconstitutional, and antithetical to the purpose of government-funded public broadcasting. First, as a matter of practical policy, the amendment imposes upon the CPB an expensive programming review obligation that the CPB is ill-suited to conduct. Both the CPB’s methods of surveying and assessing public broadcasting programming and its annual report to Congress will likely generate increased controversy and criticism of the agency. Thus, the amendment will force the CPB to spend scarce financial and human resources chasing an unattainable goal, only to attract greater congressional scrutiny of its programming choices and allocation of fiscal resources.

Second, from a legal perspective, the “objectivity and balance” amendment is unconstitutional for several reasons. The imposition of content-based conditions on government subsidies for expressive activities raises concerns about infringement of the freedom of speech. The “objectivity and balance” amendment infringes upon the free speech rights of the CPB, program producers, station managers, and the public broadcasting audience, without being closely fitted to the government’s purported objective of ensuring accountability for the use of federal funds. Furthermore, under the tests articulated by the Supreme Court in *Rust v. Sullivan*,<sup>17</sup> the “objectivity and balance” amendment is an unconstitutional condition, because it infringes on the free speech rights of grant recipients outside the confines of the government program.<sup>18</sup> Additionally, “objectivity and balance” is an unconstitutionally vague criterion to serve as a condition for federal funding in a traditional sphere of free expression; it violates the First Amendment by chilling speech and diminishing the vitality of the public debate. Lastly, the facially viewpoint-neutral “objectivity and balance” criterion was imbued with the political motivations of the amendment’s supporters, suggesting a pretext for the suppression of speech critical of government policies.

Third, even if the “objectivity and balance” standard was not unworkable or unconstitutional, it would nevertheless conflict with the original and well-reasoned rationale for government-funded public broadcasting. The public broadcasting system was established as a corrective “gap-filler” for the commercial marketplace’s failure to deliver a debate that is “uninhibited, robust, and wide open.”<sup>19</sup> Hence, programs on public broadcasting should not be required to be “objective” or “balanced” in comparison with other programs on *public* broadcasting; rather public broadcasting programs should strive to balance the programs available *outside* of public broadcasting, in the commercial marketplace of ideas. This mandate requires that affirmative steps be taken

---

Censorship).

17. 111 S.Ct. 1759 (1991).

18. See *infra* notes 147-53 and accompanying text.

19. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

to insulate the CPB further from both governmental and marketplace forces which compromise its mission to generate a diversity and balance of perspectives in the overall broadcast landscape. Thus, the 1992 "objectivity and balance" amendment contravenes the CPB's mandate to fill the gaps in the commercial broadcasting spectrum.

Part I of this Note summarizes the structure of public broadcasting in the United States and the role that government funding plays within that structure, with a particular emphasis on the role of the CPB. Part II examines how the 1992 "objectivity and balance" amendment fundamentally alters the original mandate of the original Public Broadcasting Act of 1967, which created the CPB and included its own "objectivity and balance" provision. Part III analyzes the practical difficulties the CPB and Congress face in attempting to implement the 1992 amendment. Part IV examines the potential legal challenges to the 1992 amendment. Part V explores how the 1992 "objectivity and balance" amendment contravenes the gap-filling role of public broadcasting. Finally, this Note concludes that the 1992 amendment is unworkable, unconstitutional, and antithetical to the vital role that public broadcasting was intended to play: namely, supplementing commercially produced speech, and thereby, making available to television viewers and radio listeners a public debate that is genuinely "uninhibited, robust, and wide open."

## I. THE HISTORY AND STRUCTURE OF PUBLIC BROADCASTING IN AMERICA

Any assessment of the practical and legal implications of the 1992 "objectivity and balance" amendment must take place against the backdrop of the history and structure of public broadcasting in America and the role that federal funding plays in the public broadcasting system. This section examines the origins of the CPB and the roles and responsibilities of the other entities that comprise the public broadcasting system.

### A. *Federal Funding of Public Television: The Role of the CPB*

Noncommercial, "educational" broadcasting has long been a part of the American broadcast landscape.<sup>20</sup> Since 1939, the Federal Communications Commission (FCC) has set aside radio and television frequencies for noncom-

---

20. For a history of public broadcasting in America prior to 1967, see *FCC v. League of Women Voters*, 468 U.S. 364, 367 (1984); THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 21-29 (1967) [hereinafter CARNEGIE I]; THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST 33-35 (1979) [hereinafter CARNEGIE II].

## “Objectivity and Balance” in Public Broadcasting

mercial and educational use.<sup>21</sup> However, despite these allocations, by the early 1960s, it was apparent that local and private funds were inadequate for the development and maintenance of a national educational television system. Responding to this need, Congress for the first time provided federal funding for educational television through the Educational Television Act of 1962.<sup>22</sup>

In 1966, following a national conference regarding long-range financing options for educational television, the Carnegie Commission on Educational Television was formed. Supported by New York's Carnegie Corporation, the Carnegie Commission's mission was to study the status of noncommercial television and issue recommendations for change.<sup>23</sup> The Carnegie Commission proposed a set of twelve recommendations, including the creation of a private Corporation for Public Television.<sup>24</sup> In its final report, the Carnegie Commission stated, “[w]hat we have sought to design is an institution that . . . will receive and disburse federal . . . funds . . . yet will be free of political interference.”<sup>25</sup>

The influential Carnegie Commission report led to the introduction and passage of the Public Broadcasting Act of 1967 (the 1967 Act),<sup>26</sup> which amended the Communications Act of 1934<sup>27</sup> and established the current statutory framework for the federal government's role in funding public broadcasting. The 1967 Act established the CPB<sup>28</sup> to serve as the conduit through which federal funding would be disbursed to public broadcasting stations and program producers, in order to generate and distribute programming through a national “interconnection” system of public broadcasting stations.<sup>29</sup>

The 1967 Act declared the CPB to be “a non-profit corporation . . . which

---

21. See *League of Women Voters*, 468 U.S. at 367 (citing 47 C.F.R. §§ 4.131-4.133 (1939) (regarding radio frequencies) and 41 F.C.C. 148 (1952) (regarding television assignments)). According to a report of the Senate Committee on Commerce, Science and Transportation, a full 32% of all assigned television channels are assigned to noncommercial, educational television stations, and approximately 650 public radio stations comprise 0.5% of the FM band. S. REP. NO. 221, 102d Cong., 1st Sess. 7 (1991).

22. Pub. L. No. 87-447, 76 Stat. 64 (authorizing HEW to distribute \$32 million in matching grants for noncommercial television facilities construction).

23. H.R. REP. NO. 363, 102d Cong., 1st Sess. 5-6 (1991).

24. The Carnegie Commission was formed to study public television only. However, its recommendations were later extended by Congress to encompass noncommercial “public” radio as well. *League of Women Voters*, 468 U.S. at 368, n.3.

25. CARNEGIE I, *supra* note 20, at 37.

26. Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified at 47 U.S.C. §§ 390-399 (1988)). “The [Carnegie] Commission's report met with widespread approval, and its proposals became the blueprint for the Public Broadcasting Act of 1967.” *League of Women Voters*, 468 U.S. at 368.

27. The Communication Act of 1934, 1934, ch. 652, § 3285, 48 Stat. 1074 (1934) (codified as amended in scattered sections of 47 U.S.C.). The Communications Act of 1934 established the overarching structure of federal regulation of broadcasting in America and created the Federal Communications Commission (FCC) to regulate the activities of all broadcast licensees. 47 U.S.C. § 303 (1988). The FCC is authorized to issue and enforce regulations that are consistent with “the public convenience, interest, or necessity.” *Id.*

28. 47 U.S.C. § 396(b) (1988).

29. *Id.* § 396(g)(1)(B).

will not be an agency or establishment of the United States Government."<sup>30</sup> However, several provisions of the Act suggest the CPB is more a quasi-state entity than a private corporation. The President, subject to Senate approval, appoints the members of the CPB's Board of Directors who serve for staggered, six-year terms.<sup>31</sup> Originally, no more than eight members of the CPB's fifteen-member Board of Directors were to come from the same political party.<sup>32</sup> The CPB is required to file annual reports to Congress,<sup>33</sup> and its financial records are subject to auditing by the General Accounting Office.<sup>34</sup>

Concerned that public broadcasting could easily become dominated by a powerful central organization in control of funding, Congress enacted several measures to vest control of programming in local stations, rather than the CPB.<sup>35</sup> The 1967 Act prohibits the CPB from owning or operating any television or radio broadcast station, system, or network.<sup>36</sup> Nor can the CPB produce, schedule, or disseminate programs to the public.<sup>37</sup> Thus, each local licensee maintains the authority and responsibility for selecting the programs it airs.<sup>38</sup>

In 1969, to help fulfill its mandate to create a national "interconnection" system of public television stations,<sup>39</sup> the CPB helped organize the public television stations; it formed the Public Broadcasting Service (PBS), a non-profit, station-owned and operated membership organization that facilitates

30. *Id.* § 396(b).

31. *Id.* § 396(c).

32. *Id.* § 396(c)(1). Currently, the Board consists of nine members, of which no more than five may be of the same party. Pub. L. No. 102-356, § 5(a), 106 Stat. 949, 949-50 (1992).

33. 47 U.S.C. § 396(i) (1988).

34. *Id.* § 396(l)(2)(A) (1988). For these reasons, at least one former Justice of the Supreme Court concluded, "it is difficult to see why [the CPB] is not a federal agency engaged in operating a 'press' as that word is used in the First Amendment." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 149 (1973) (Douglas, J., concurring). *But see* *Network Project v. Corporation for Pub. Broadcasting*, 561 F.2d 963, 968 (D.C. Cir. 1977) (holding the CPB is not an agency of the federal government), *cert. denied*, 434 U.S. 1068 (1978); *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399 (D.D.C. 1979) (holding the CPB not a state actor). Whether or not the CPB is considered a "state actor," the "objectivity and balance" restrictions on CPB funding are subject to constitutional scrutiny because the congressional act of imposing conditions upon the use of government funds is unquestionably state action. *See infra* Part IV.B.

35. S. REP. NO. 222, 90th Cong., 1st Sess. 7 (1967) [hereinafter 1967 SENATE REPORT] ("[The CPB] will assist in making programs available to stations, but the determination of what programs will be broadcast remains with the stations themselves. Individual stations, therefore, retain the responsibility to assess community needs and determine what programs will best meet those needs."); H.R. REP. NO. 572, 90th Cong., 1st Sess. 18 (1967) [hereinafter 1967 HOUSE REPORT] (same). Thus, the broadcast stations, as FCC licensees, are accountable to the FCC regulations applicable to all broadcasters. However, local stations are not accountable to the FCC or Congress under the "objectivity and balance" language of the 1967 Act. That provision expressly applies only to the activities of the CPB. *See infra* text accompanying notes 83-84.

36. 47 U.S.C. § 396(g)(3)(A) (1988).

37. *Id.* § 396(g)(3)(B) (1988).

38. *See* *Accuracy in Media, Inc. v FCC*, 521 F.2d 288, 295 (D.C. Cir. 1975) (holding that public broadcast station licensees are accountable to FCC regulation under public interest standard and fairness doctrine), *cert. denied*, 425 U.S. 934 (1976).

39. 47 U.S.C. § 396(g)(2)(E) (1988).

## "Objectivity and Balance" in Public Broadcasting

national distribution of programming.<sup>40</sup> One year later, the CPB helped non-commercial radio stations form National Public Radio (NPR), another non-profit, station-owned membership organization for national radio program production and distribution.<sup>41</sup>

To carry out its purposes, the CPB is authorized to obtain funds from private, state, and federal agencies, organizations, or institutions.<sup>42</sup> Federal funding originally was provided to the CPB through annual congressional authorizations.<sup>43</sup> However, in 1975, Congress established a system of three-year funding authorizations, made two years in advance.<sup>44</sup>

The Public Broadcasting Act also mandates the way in which the CPB disburses funds for public broadcasting. CPB funds are divided into three general categories: (1) administrative and interconnection operating costs;<sup>45</sup> (2) basic grants to broadcast stations for their discretionary use;<sup>46</sup> and (3)

---

40. PBS is incorporated separately from the CPB and is governed by a board of directors elected by public television stations. PBS does not produce its own programs, but does make programs available to member stations. In 1991, there were 348 stations in the Public Broadcasting System. CORPORATION FOR PUBLIC BROADCASTING, CPB FACT SHEET (1992). In 1991, PBS stations received 15% of their funding from the CPB. *Id.*

41. "[U]nlike PBS, NPR was to have a second major mandate: to produce programs." CORPORATION FOR PUB. BROADCASTING, FROM WASTELAND TO OASIS, 1991 ANNUAL REPORT 7 (1992) [hereinafter CPB 1991 ANNUAL REPORT]. There were over 373 member stations in NPR in 1991. *Id.* at 32.

42. 47 U.S.C. § 396(g)(2)(A) (1988). Despite this authorization, CPB receives all of its revenues from congressional appropriations. Telephone Interview with Jeannie Bunton, CPB Office of Corporate Communications (Feb. 16, 1994). Nevertheless in 1992, CPB grants comprised only 14% of the total income of the public broadcasting industry (which includes the broadcast stations, PBS, and NPR). The federal government supplies an additional 6.7% to public broadcasting through direct funding (e.g., through the National Endowment for the Arts and the National Endowment for the Humanities); 21.4% of public broadcasting's income comes from subscribers, 16.8% from business, 17.7% from state and local governments, 10.7% from state and other colleges, 4.5% from foundations, 1% from auctions, and 7% from "all other" sources. CORPORATION FOR PUB. BROADCASTING, PUBLIC BROADCASTING INCOME FOR FISCAL YEAR 1992 (1993).

43. The Carnegie Commission had recommended funding the CPB through an excise tax on all television sets sold in America. *See infra* note 72; H.R. REP. NO. 363, *supra* note 23, at 9 (listing annual funding levels of the CPB from 1969 until 1993).

44. Public Broadcasting Financing Act of 1975, Pub. L. No. 94-192, § 2, 89 Stat. 1099, 1099-100. The one-year authorizations are subsequently appropriated by Congress two years in advance of expenditure by the CPB. CORPORATION FOR PUB. BROADCASTING, 1991 ANNUAL REPORT 8 (1992); *see* FCC v. League of Women Voters, 468 U.S. 364, 392 n.21 (1984) (describing how Nixon Administration veto of the CPB funding reauthorization bill in 1972 prompted legislation authorizing long-range financing "to provide adequate insulation from government interference"). During the 1992 reauthorization debate, Congress rejected an amendment to return CPB funding to an annual authorization process. *Politics Jeopardizes Public Broadcasting Funds*, NEWS MEDIA & L., Spring 1992, at 53.

45. 47 U.S.C. § 396(k)(3)(A)(i) (1988). CPB's annual administrative costs are fixed by a formula tied to the Consumer Price Index, and in no case can they exceed five percent of the CPB's authorization. *Id.*

46. 47 U.S.C. § 396(k)(3)(A)(ii)(I), (iii)(I) (1988). These unrestricted "Community Service Grants" (CSGs), which in 1994 equalled 66% of the CPB's annual budget, go directly to stations that qualify, according to a set formula that considers staff size, hours of on-air operation, and private revenues. *See* CORPORATION FOR PUB. BROADCASTING, APPROPRIATION REQUEST FOR FISCAL YEAR 1997, 45 (Feb. 1994) [hereinafter CPB 1997 APPROPRIATION REQUEST] (describing formula for CSGs). CSGs "may be used at the discretion of the recipient for purposes related primarily to the production or acquisition of programming." 47 U.S.C. § 396(k)(7) (1988).



program funds disbursed as grants to independent producers<sup>47</sup> and other entities that produce radio and television programming.<sup>48</sup>

The CPB currently allocates approximately twenty-one percent of its budget to program development and production.<sup>49</sup> The process by which the CPB reviews television program funding proposals is a complicated one,<sup>50</sup> which was recently amended under congressional mandate.<sup>51</sup> Under this plan, production grants from the CPB Television Program Fund, which consists of approximately \$49.8 million in 1994,<sup>52</sup> are distributed through four separate mechanisms: (1) "Content-Specific Solicitations," which earmark \$12-15 million for specific content areas deemed lacking in the current PBS schedule;<sup>53</sup> (2) "Multi-Cultural Program Solicitations"; (3) "General Program Review" guidelines; and (4) the "CPB/PBS Program Challenge Fund," established in 1986, under which the CPB matches funds from PBS dollar-for-dollar to underwrite big budget "high profile" series such as *Eyes on the Prize*,

47. In 1988, Congress required the CPB, beginning in fiscal year 1990, to set aside a portion of the television "programming grants" for the Independent Production Service (renamed Independent Television Service or ITVS), a separately incorporated organization that contracts with the CPB for the expenditure of funds for production of television programs by independent producers, "to expand the diversity and innovativeness of programming available to public broadcasting." Public Telecommunications Act of 1988, Pub. L. No. 100-626, 102 Stat. 3207, codified at 47 U.S.C. § 396(k)(3)(B)(iii) (1988).

48. 47 U.S.C. § 396(k)(3)(A)(ii)(II), (iii)(II) (1988). These funds are known respectively as the "Television Program Fund" and the "Radio Program Fund." An additional 23% of radio funds are distributed to stations specifically for acquiring or producing radio programming "that is to be distributed nationally and is designed to serve the needs of a national audience." *Id.* § 396(k)(3)(A)(iii)(III) (1988). These funds are disbursed as "National Program Production and Acquisition Grants" (NPPAGs). *See infra* note 100 for debate among senators as to whether or not the "objectivity and balance" amendment applies to these grants.

National programming for public television and radio comes from multiple sources, not all of which receive funding directly from the CPB. National television programming, distributed via the PBS satellite, is produced by individual stations (or by groups of stations joining forces for major productions), or by independent producers. CPB 1991 ANNUAL REPORT, *supra* note 41, at 34. Radio programming comes from a similar mix of sources, as well as from National Public Radio, and is distributed nationally by three separate program distribution networks: National Public Radio, American Public Radio, and Pacifica Radio Foundation. *Id.*

49. CPB 1991 ANNUAL REPORT, *supra* note 41, at 74. In 1993, the CPB received 1200 formal applications for grants for television program production of which 90 received partial funding. CPB 1997 APPROPRIATION REQUEST, *supra* note 46, at 12. The average CPB grant for television programming production was \$150,000. Telephone Interview with Jeannie Bunton, CPB Office of Corporate Communications (May 19, 1993).

50. The CPB employs panels of outside experts to make program funding decisions. 47 U.S.C. § 396(g)(2)(B)(i) (1988).

51. CPB 1997 APPROPRIATION REQUEST, *supra* note 46, at 46; CPB 1991 ANNUAL REPORT, *supra* note 41, at 42 (describing the new funding plan entitled "Meeting the Mission in a Changing Environment").

52. CPB 1997 APPROPRIATION REQUEST, *supra* note 46, at 11. An additional \$22.5 million of CPB funds dedicated to national television programming is allocated to the National Programming Plan, which is managed by PBS through a contract with CPB. *Id.* at 46. An additional \$7.2 million a year is managed by ITVS. *Id.* *See supra* note 47 (describing formation of ITVS).

53. "Projects funded through content-specific solicitation include a contemporary, multi-part drama series, a pop music program aimed at younger audience, and a daily series for pre-school children." Larry Leventhal, 4 *Routes to Production Funds*, VARIETY, Sept. 21, 1992, at 83.

## "Objectivity and Balance" in Public Broadcasting

*Columbus: The Age of Discovery, or Making Sense of the Sixties.*<sup>54</sup>

In summary, the structure of public broadcasting in America is a web of numerous independent but related entities, with funding, personnel, and programming shifting between the players. The CPB is at the center of the system, providing federal funds to public broadcasters and producers, supposedly without involving the government in editorial and programming decisions.

### B. *The Vision of Public Broadcasting and the Role of the CPB*

In order to assess the meaning of the 1992 "objectivity and balance" amendment, the congressional motives behind the creation of the CPB must be further explored. Two primary objectives, each motivated by constitutional concerns, lay at the heart of the 1967 Act and have continued to inform subsequent refinements to the structure of the public broadcasting system.

First, Congress endorsed and acted upon the need that had prompted the formation of the Carnegie Commission:<sup>55</sup> that the commercial broadcast landscape had failed to provide the type of information necessary to create an informed citizenry.<sup>56</sup> Although commercial broadcasters are required by law to serve "the public interest,"<sup>57</sup> Congress explicitly recognized that this requirement alone was insufficient to ensure that the public had access to diverse and robust debate.<sup>58</sup> Congress attempted to correct this deficiency by provid-

---

54. *Id.*

55. See CARNEGIE I, *supra* note 20, at 99 ("We seek freedom from constraints, however necessary in their context, of commercial television. . . . We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him."). Indeed, the Commission envisioned that "public television" was to include "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising." *Id.* at 1.

56. The Carnegie Commission stated its vision as follows:

Public television programming can deepen a sense of community in local life. It should show us our community as it really is. It should be a forum for debate and controversy. It should bring into the home meetings, now generally untelevised, where major public decisions are hammered out, and occasions where people of the community express their hopes, their protests, their enthusiasms, and their will.

*Id.* at 92

57. 47 U.S.C. § 309(a) (1988).

58. "[T]he economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass appeal." 1967 HOUSE REPORT, *supra* note 35, at 10-11. "[The CPB] will be filling the gaps that commercial broadcasters do not fill." *Id.* at 16-17. The Senate Report echoed this view. 1967 SENATE REPORT, *supra* note 35, at 7.

Some First Amendment scholars have argued that the government is constitutionally required to provide funding for noncommercial broadcasting. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 629 (1970); WILLIAM VAN ALLSTYNE, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539, 562 (1978) ("[F]reedom of speech is abridged by a government policy that adheres only to a private property system and a market-pricing mechanism in determining who shall be able to speak."); cf. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 17 (1948) (arguing Congress is obligated to cultivate intelligence and knowledge of citizenry). But see 47 U.S.C. § 396(j) (1988) (expressly reserving right to repeal, alter, or amend the section pertaining to the CPB at any time); *FCC v. League of Women Voters*, 468 U.S. 364, 409 (1984) (Stevens, J., dissenting) ("[B]y simply terminating or reducing funding [to the CPB] Congress could curtail much more

ing government funding to establish a viable alternative to commercially driven speech on public airwaves.<sup>59</sup> The House Report on the Public Broadcasting Act of 1967 includes an eloquent discussion of the role public broadcasting could play in fostering democratic values:

[T]he rewards which are reasonably to be expected from this seed program cannot be measured in money alone. Who can estimate the value to a democracy of a citizenry that is kept fully and fairly informed as to the important issues of our times . . . The town meeting may have disappeared, but nevertheless the success of our democratic institutions still depends upon the informed judgments of the citizens of our cities, towns, and local communities. . . . The program support provided by [the CPB enabling legislation] will, among other things, enable the non-commercial educational broadcast stations to provide supplementary analysis of the meaning of events already covered by commercial newscasters.<sup>60</sup>

Congress expressed this same firm commitment in its "Declaration of Policy" that introduced the 1967 Act: "[I]t furthers the general welfare to encourage public telecommunications services . . . which will constitute an expression of diversity and excellence, and which will constitute a source of *alternative* telecommunications services for all citizens of the Nation."<sup>61</sup>

The fact that Congress conceived public broadcasting as a means of "filling gaps" left by commercial broadcast programming is important for two reasons: (1) it refutes the argument that in an era of 500 cable channels,<sup>62</sup> public broadcasting has become obsolete,<sup>63</sup> for there is still a need to "fill gaps" left by commercially driven speech, and (2) it suggests that a standard of balance within public broadcasting programming is inconsistent with the broader mandate of public broadcasting to supplement commercially driven speech.<sup>64</sup>

The 1967 legislation also reflected a second congressional concern that providing federal funding for public broadcasting should not permit the govern-

---

expression with no risk whatever of a constitutional transgression."); *CARNEGIE I*, *supra* note 20, at 69 (noting that Congress has prerogative to withdraw funding at any time).

59. See 1967 SENATE REPORT, *supra* note 35, at 4 ("There is general agreement that for the time being, Federal financial assistance is required to provide the resources necessary for quality programs.").

60. 1967 HOUSE REPORT, *supra* note 35, at 10. Similarly, in signing the 1967 Act, President Johnson expressed his hope that public broadcasting "would help make our nation a replica of the Greek marketplace, where public affairs took place in view of all the citizens." WEEKLY COMP. PRES. DOC. 1531 (Nov. 13, 1967). President Johnson compared the Act to the 1862 Morrill Act, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301-308 (1988)), which set aside lands in every state to build land grant colleges: "So today we rededicate a part of the airwaves—which belong to all the people—and we dedicate them for the enlightenment of all the people." *Id.*

61. 47 U.S.C. § 396(a)(5) (1988) (emphasis added); see also *id.* at § 396(a)(6) ("It is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities.").

62. See, e.g., Mark Landler, *50,000 Channels and Nothing to Watch*, BUS. WK., Mar. 22, 1993, at 39; Harry F. Waters & Lucille Beachy, *Next Year 500 Channels*, NEWSWEEK, Mar. 1, 1993, at 75.

63. See Andersen, *supra* note 16, at 75 ("[I]n a world of CNN, C-SPAN, A&E, and the Discovery Channel, public TV begins to seem redundant."); Elizabeth Jensen, *Barney & Friends: Public TV Prepares for Image Transplant to Justify Existence*, WALL ST. J., Jan. 13, 1994, at A1 (same).

64. See *infra* Part V.

## “Objectivity and Balance” in Public Broadcasting

ment to unconstitutionally influence the content of programming on public broadcasting stations.<sup>65</sup> President Johnson’s message in transmitting the proposed Public Broadcasting Act to Congress addressed this overarching concern: “Noncommercial television and radio in America, even though supported by Federal funds, must be absolutely free from any Federal Government interference over programming.”<sup>66</sup> This constitutional concern regarding the intrusion of government funding into the marketplace of ideas was evident throughout the congressional discussion of the 1967 Act:

How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.

Every witness who discussed the operation of the [CPB] agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation, directed by a Board of Directors, none of whom will be Government employees, will provide the most effective insulation from Government control or influence over the expenditure of funds.<sup>67</sup>

Accordingly, Congress built into its design of the public broadcasting system three separate mechanisms for ensuring that programming decisions would be insulated from government interference: (1) a decentralized system in which ultimate programming authority resides with local station licensees, not the CPB;<sup>68</sup> (2) the creation and design of the CPB itself, as a private, nongovernmental entity with numerous statutory constraints on its composition,

---

65. See *CARNEGIE I*, *supra* note 20, at 131-32 (Memorandum of Law concluding that “[t]here is . . . a good possibility that for First Amendment purposes the [CPB] would be considered a non-governmental entity” and therefore the First Amendment would not be implicated by the CPB action). Furthermore, according to the memorandum, “[e]ven if the [CPB] were held to be a governmental instrumentality in the constitutional sense, we do not believe that the activities in which it is intended to engage would abridge the First Amendment” because “[t]he courts have not found affirmative efforts to develop and expand various forms of communications to be an abridgment, even when the government itself does so.” *Id.* at 132. “There would be no penalty involved in rejecting a producer’s work. Programs found not acceptable for support by the [CPB] would not be suppressed. They would be available for dissemination through other means.” *Id.* (footnote omitted).

66. 1967 SENATE REPORT, *supra* note 35, at 11. Upon signing the 1967 Act, Johnson remarked: “[The CPB] will get part of its support from our Government. But it will be carefully guarded from government or from party control.” WEEKLY COMP. PRES. DOC. 1531 (Nov. 13, 1967).

67. 1967 HOUSE REPORT, *supra* note 35, at 15; see also 1967 SENATE REPORT, *supra* note 35, at 4 (“Federal financial assistance . . . should in no way involve the Government in programming or program judgments. An independent entity supported by Federal funds is required to provide programs free of political pressures.”).

68. See *supra* text accompanying notes 35-38. “We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast . . . [L]ocal autonomy of stations and diversity of program sources will provide operational safeguards to assure the democratic functioning of the system.” 1967 SENATE REPORT, *supra* note 35, at 7-8, 11. As further protection against either government funding serving as rewards or penalties, the local public broadcast stations are prohibited from supporting or opposing any candidate for political office. 47 U.S.C. § 399 (1988).

authority, and influence over programming;<sup>69</sup> and (3) other statutory provisions that expressly prohibit governmental interference in programming decisions.<sup>70</sup> These rather emphatic declarations reflect Congress's strong commitment to ensure that government funding of public broadcasting "in no way" infringed upon the editorial discretion of program producers and station managers. As the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) summarized, "[r]eference to the legislative history of the 1967 Act shows a deep concern that governmental regulation or control over the [CPB] might turn the CPB into a Government spokesman. Congress thus sought to insulate CPB by removing its 'programming activity from governmental supervision.'"<sup>71</sup>

Even these protections, however, would not completely insulate the CPB from political pressure, were it dependent upon the sitting administration and Congress for its fiscal survival.<sup>72</sup> Congress was emphatic in declaring that federal funding of the CPB "should in no way involve the Government in programming or program judgments."<sup>73</sup> One method for limiting the federal government's influence over programming was to limit the extent to which public broadcasting was dependent on federal funds.<sup>74</sup> Despite this limit, after

---

69. In establishing the CPB, Congress declared that "a private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control." 47 U.S.C. § 396(a)(8) (1988). Congress also designed the CPB to prevent it from falling under the control of the incumbent administration, or other political party. The "insulating safeguards" included the bipartisan composition of the Board, *id.* § 396(c)(1), the staggered terms of Board members to prevent one president from "stacking" the Board, *id.* § 396(c)(5), a prohibition against using any political test or qualification for the CPB employees, *id.* § 396(e)(2), and a prohibition against the CPB supporting any political party or candidate for elective public office, *id.* § 396(f)(3).

70. Congress specifically authorized the CPB "to carry out its purposes and functions . . . in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities." 47 U.S.C. § 396(g)(1)(D) (1988). The 1967 Act further prohibits "any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over public telecommunications, or over the [CPB] or any of its grantees or contractors . . ." 47 U.S.C. § 398(a) (1988). In addition, an amendment to the 1934 Communications Act, originally added in 1962, prohibits "any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the content or distribution of public telecommunications programs and services . . ." 47 U.S.C. § 398(c) (1988).

71. *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975) (quoting H.R. REP. NO. 572, 90th Cong., 1st Sess., 19 (1967)), *cert. denied*, 425 U.S. 934 (1976).

72. In recognition of this fact, the Carnegie Commission recommended that an excise tax on all television sets be used to establish a trust fund for the CPB, as a means of avoiding the inevitable political pressures that would surround annual authorizations. See CARNEGIE I, *supra* note 20, at 69-70.

Congress, however, did not adopt the Commission's excise tax proposal. See MARILYN LASHLEY, PUBLIC TELEVISION: PANACEA, PORK BARREL OR PUBLIC TRUST? 30 (1992) (describing Johnson Administration's modification of Carnegie Commission recommendations to win approval from House Ways and Means Committee, commercial broadcasters, and television set manufacturers); Clark, *supra* note 7, at 820 (discussing successful opposition and defeat of proposed excise tax by the Electronic Industries Association).

73. 1967 SENATE REPORT, *supra* note 35, at 4; 1967 HOUSE REPORT, *supra* note 35, at 15.

74. The Senate Report looked forward to increased private contributions so that "[e]ventually the major source of revenue for the [CPB] will be directly from the people of the United States . . ." 1967 SENATE REPORT, *supra* note 35, at 8. In 1992, the federal government provided approximately 21% of public broadcasting's income. CORPORATION FOR PUB. BROADCASTING, PUBLIC BROADCASTING INCOME FISCAL

## “Objectivity and Balance” in Public Broadcasting

the Nixon Administration demonstrated that the CPB’s annual reauthorization presented an opportunity to apply political pressure to public broadcasting,<sup>75</sup> Congress instituted the unique advanced multi-year funding mechanism described above.<sup>76</sup> Congress intended it to further insulate public broadcasting programming decisions from the influence of federal funding.<sup>77</sup>

Having provided what it felt were necessary structural and statutory “safeguards” against governmental interference, Congress was not willing to leave the CPB completely unaccountable for its programming decisions. The 1967 Act, therefore, provided the CPB with explicit statutory guidance on how it was to conduct its activities. It authorized the CPB

to facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, *with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.*<sup>78</sup>

The “objectivity and balance” provision of the 1967 Act was the focus of attention in the 1992 reauthorization debate, in which conservative senators repeatedly referred to public broadcasting’s failure to live up to its existing congressional mandate.<sup>79</sup> The resulting “objectivity and balance” amendment explicitly incorporated the language of the 1967 Act. Thus, it is important to understand what obligations the original language imposed upon the CPB, and how the 1992 amendment altered those obligations.

## II. THE “OBJECTIVITY AND BALANCE” MANDATE: THEN AND NOW

Although their language is similar, the “objectivity and balance” provision of the 1967 Act and the 1992 “objectivity and balance” amendment have quite different meanings and effects. The legislative history and subsequent judicial interpretation of the 1967 language reveal that Congress originally provided the CPB with broad, general, aspirational language that Congress could use

---

YEAR 1992, Fig. 5 (1993).

75. See *FCC v. League of Women Voters*, 468 U.S. 364, 392 n.21 (1984) (describing Nixon Administration veto of CPB funding legislation); LASHLEY, *supra* note 72, at 33-37 (same); DAVID M. STONE, *NIXON AND THE POLITICS OF PUBLIC BROADCASTING* (1985).

76. See *supra* text accompanying note 44. CPB 1991 ANNUAL REPORT, *supra* note 41, at 8 (“[T]he year-at-a-time funding process in Congress opened CPB’s program financing to political tinkering—contrary to the vision of the [1967] Act, which took pains in all other respects to ensure that public support would be nonpolitical.”).

77. See S. REP. NO. 55, 94th Cong., 1st Sess. (1975); H.R. REP. NO. 245, Pts. 1 & 2, 94th Cong., 1st Sess. (1975).

78. 47 U.S.C. § 396(g)(1)(A) (1988) (emphasis added).

79. See *supra* notes 8-10.

to assess the CPB's overall performance in its annual reauthorizations. The 1992 amendment transformed that aspirational language into an enforceable standard to be applied by Congress against public broadcasting entities, transforming the CPB into an intermediary content reviewer and penalty assessor.

*A. The Original "Objectivity and Balance" Mandate:  
An Aspirational Objective for the CPB*

The "objectivity and balance" provision of the 1967 Act was not part of either the original House or Senate bills; it was added to the House bill in the Interstate and Foreign Commerce Committee, and subsequently adopted by the Senate.<sup>80</sup> Although it is uncertain whether the legislators shared a common understanding of what responsibility this language was meant to impose upon the CPB,<sup>81</sup> several aspects of the provision are relatively clear. The language specifically is limited to activities of the CPB, and so does *not* apply to producers or to individual commercial broadcasting licensees. Congressional leaders understood that noncommercial broadcast stations remained accountable to all preexisting regulations on broadcast licensees generally, including the Fairness Doctrine and the equal time provision for political candidates.<sup>82</sup>

As interpreted by the D.C. Circuit Court, the original "objectivity and balance" language of the 1967 Act is "not a substantive standard, legally enforceable by agency or courts," against either public broadcasting stations or the CPB.<sup>83</sup> The D.C. Circuit Court held that the FCC lacked authority to enforce the "objectivity and balance" language against local public broadcasting stations.<sup>84</sup> The court stated that this reading of the "objectivity and balance" provision was consistent with the 1967 Act's prohibition against federal governmental "direction, supervision, or control" over public broadcasting or the CPB.<sup>85</sup> In another case, the D.C. Circuit Court held that private citizens

---

80. Note, "Balance and Objectivity" in *Public Broadcasting: Fairer Than Fair?*, 61 VA. L. REV. 643, 676 (1975) [hereinafter Note, *Fairer than Fair*] (analyzing the legislative history of the original "objectivity and balance" provision).

81. *Id.* at 675 n.45.

82. *Id.* at 651-54 (quoting several statements by Senate and House sponsors of the 1967 Act which affirm that FCC regulations were to remain applicable to noncommercial broadcasters). For example, Congressman Springer pointed out "that all of the sections of the Federal Communications Act apply to non-commercial stations—the fairness doctrine, the equal time provisions and all." 113 CONG. REC. 26387 (1967) (statement of Rep. Springer).

83. *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

84. *Id.* at 296 n.40. The court also held that the CPB is not subject to FCC regulation because it is not a broadcast licensee. *Id.* at 292. While noncommercial licensees are subject to FCC regulations governing all broadcasters, *id.* at 296, the FCC cannot enforce provisions of the Public Broadcasting Act against individual licensees, *id.* at 297; *California Pub. Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985).

85. 47 U.S.C. § 398 (1988).

## “Objectivity and Balance” in Public Broadcasting

cannot invoke the “objectivity and balance” language to challenge editorial or programming decisions of public broadcasters, or funding decisions of the CPB.<sup>86</sup>

In order to construe the original “objectivity and balance” language, the D.C. Circuit Court referred to the multiple “insulating provisions” and the legislative history of the Act, as well as to the constitutional balance of interests reflected therein.<sup>87</sup> The court found that through “the statutory requirements and through control over the ‘purse strings,’ Congress reserved for itself oversight responsibility for the CPB.”<sup>88</sup> While it was uncertain precisely what obligations Congress intended by imposing the “objectivity and balance” language on the CPB,<sup>89</sup> the court suggested that it was a standard that would restrict free speech more severely than the existing Fairness Doctrine if imposed upon licensees. Thus, FCC enforcement of the “objectivity and balance” language would raise “substantial constitutional questions.”<sup>90</sup> Rather than presume that the “objectivity and balance” language reflected Congress’s intention to alter the delicate constitutional balance struck in prior decisional law,<sup>91</sup> the court concluded: “[W]e view the provision as a guide to Congressional oversight policy and as a set of goals to which the Directors of the CPB should aspire.”<sup>92</sup>

As a result of these decisions, Congress alone retained the authority to hold the CPB accountable to the “objectivity and balance” provisions of the 1967

---

86. *Network Project, Inc. v. Corporation for Pub. Broadcasting*, 561 F.2d 963, 975 (D.C. Cir. 1977) (“[P]rivate rights of action are not part of the machinery devised by Congress for control of CPB’s activities.”), *cert. denied*, 434 U.S. 1068 (1978).

87. *Accuracy in Media*, 521 F.2d at 296-97 (concluding that to allow the FCC to enforce “objectivity and balance” against public broadcasting stations would produce “enlargement of government control of programming”); *see also* *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (holding that FCC need not require broadcasters to accept all paid political advertising because such requirement unduly impinges upon broadcasters’ speech rights).

88. *Accuracy in Media*, 521 F.2d at 294.

89. *Id.* at 296-97, 297 n.41. There are many questions raised by the language of the provision that are not easily answered: Does it mean the same thing as the Fairness Doctrine, or something different? *See infra* notes 173-80 and accompanying text. Is the “objectivity and balance” language limited only to programs that are directly funded by the CPB, or does it apply to all “controversial programming” on PBS and NPR? *See* *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1117 (1978) (stating that the “‘objectivity and balance’ standard . . . is applicable only to the CPB itself”); Anne W. Branscomb, *A Crisis in Identity, Reflections on the Future of Public Broadcasting*, in *THE FUTURE OF PUBLIC BROADCASTING* 23 (Douglass Cater & Michael Nyhan eds., 1976) (“[T]he only thing certain about the terms ‘objectivity and balance’ is that they apply only to programs funded by the CPB.”); Note, *Fairer Than Fair*, *supra* note 80, at 666-67 (arguing that the standard should only apply to the CPB-funded programs). *But see infra* note 100 (statements of Sen. Dole to the contrary).

90. *Accuracy in Media*, 521 F.2d at 297; *see infra* notes 173-80 and accompanying text (comparing the First Amendment impact of the Fairness Doctrine to that of the revised “objectivity and balance” standard).

91. *See infra* note 180 and accompanying text.

92. *Accuracy in Media*, 521 F.2d at 297. The court later referred to the “objectivity and balance” provision as “hortatory language.” *Id.* It also interpreted 47 U.S.C. § 396(g)(1)(A) holistically, *authorizing* but not *requiring* that the CPB *facilitate* the process of making programs available with strict adherence to objectivity and balance, as opposed to actually making programs available on this basis. *Id.*



Act. Several times prior to 1992, Congress and the White House invoked the "objectivity and balance" language to put pressure on the CPB and PBS programming decisions.<sup>93</sup> It was not until 1992, however, that Congress decided to change the rules of the game.

### B. *The 1992 Amendment: Aspirational Goal to Legal Requirement*

The 1992 "objectivity and balance" amendment begins with an invocation of the existing language of the 1967 Act. However, the drafters of the amendment converted the 1967 "hortatory" language into a concrete enforceable standard with specific performance requirements. The amendment states that the Board of Directors of the CPB shall:

(2) after soliciting the views of the public, establish a comprehensive policy and set of procedures to—

(A) provide reasonable opportunity for the members of the public to present comments to the Board regarding quality, diversity, creativity, excellence, innovation, objectivity, and balance of public broadcasting services. . . .<sup>94</sup>

(B) review, on a regular basis, national public broadcasting programming for quality,

---

93. In 1972, angered by the manner in which PBS covered his Administration, President Nixon vetoed the bill reauthorizing funding for the CPB. See *FCC v. League of Women Voters*, 468 U.S. 364, 392 n.21 (1983) (describing how Nixon's veto of CPB funding in 1972 prompted legislation to authorize long-range financing "to provide adequate insulation from government interference"); *CARNEGIE II*, *supra* note 20, at 43-44 (discussing Nixon's veto and Patrick Buchanan's criticism of PBS programs that were considered "anti-administration"); *STONE*, *supra* note 75. In response to this pressure from the Nixon White House, CPB decided to cut all funding to its nationally broadcast news and information programs because "some CPB board members believed federal funds should not be used for the production of 'controversial programs.'" Oscar G. Chase, *Public Broadcasting and the Problem of Government Influence: Towards A Legislative Solution*, 9 J. L. REFORM 62, 87 n.198 (1975).

Again in 1986, reacting to several PBS documentaries that criticized American foreign policy, several congressmen pressured the CPB to conduct a program "content analysis." This effort was ultimately rejected by the CPB. See *infra* note 201; see also *PBS Averts CPB Inquiry Into Bias Claim*, *NEWS MEDIA & L.*, Summer 1987, at 6-7; Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J. L. & POL. 625, 637-38, n.57 (1987) (describing the political motivations of senators who requested the 1986 CPB content analysis). Then-CPB board member Sharon Rockefeller said of the proposed CPB content analysis, "[i]t countermands the reason the CPB is in existence . . . . We are there to assure maximum freedom from interference with or control of program content. If this proposed study does not violate that mandate, I don't know what would." LAURENCE JARVIK, *HERITAGE FOUNDATION, MAKING PUBLIC TELEVISION PUBLIC* (1992). Rockefeller went on to claim that "objectivity," "balance," and "bias" are virtually impossible to define and that the proposed study would have a "chilling effect" on public television. *Id.*

See also *infra* notes 211-16 and accompanying text (discussing 1973 attempt to force public broadcasters to make and retain recordings of programs on issues of public importance).

94. The CPB has taken several steps on this front. The CPB allocated \$796,000 for 1993-94 for its "Open to the Public" campaign, which includes a toll-free phone number to receive and record viewer comments. In the Fall of 1993, the CPB conducted four "town meetings" in four cities, to help assess community reaction to public broadcasting programming. The CPB plans to present a series of seminars on editorial integrity and programming responsibility for public broadcasters, and to produce a "report card" evaluating public broadcasting programming prepared by a panel of media critics, scholars, and broadcasters. For more details describing the CPB's "Open to the Public" campaign, see *CORPORATION FOR PUB. BROADCASTING, REPORT TO CONGRESS ON STEPS TAKEN BY THE CPB IN RESPONSE TO SECTION 19 OF THE PUBLIC TELECOMMUNICATIONS ACT OF 1992: THE FIRST YEAR 2-15* (1994) [hereinafter, 1994 CPB REPORT TO CONGRESS].

## “Objectivity and Balance” in Public Broadcasting

diversity, creativity, excellence, innovation, objectivity, and balance, as well as for any needs not met by such programming;

(C) on the basis of information received through such comment and review, take such steps in awarding programming grants . . . that it finds necessary to meet the [CPB’s] responsibility under § 396(g)(1)(A) . . . including facilitating objectivity and balance in programming of a controversial nature;<sup>95</sup> and . . .

(3) starting in 1993, by January 31 of each year, prepare and submit to the President for transmittal to the Congress a report summarizing its efforts [to satisfy the requirements of this amendment].<sup>96</sup>

It is informative to explore how this new policy differs from the original “objectivity and balance” provision of the 1967 Act. First, it could be argued that Congress did not extend to itself or to the CPB any new oversight powers, since the CPB appears to retain complete discretion as to how it will establish and implement its “comprehensive policy and set of procedures.” Arguably, this could include the option of doing nothing differently than the current policy and procedures for facilitating objectivity and balance.<sup>97</sup> This argument fails, however, because it is implausible that Congress would require the CPB to implement this time-consuming and costly undertaking and to submit an annual report to Congress if it found the status quo acceptable.

Although seeming to allow the CPB to continue to police itself, Congress sought changes in the regulation of public broadcasting programming. Notably, the language of the 1967 Act merely “authorizes” the CPB to “facilitate the availability of programming” with strict adherence to objectivity and balance in controversial programs. In contrast, the new amendment converts this authorization into a statutory requirement, by replacing “is authorized to” with the command “shall.”

A second important change is found in the amendment’s requirement that the CPB review and evaluate the objectivity and balance of *all* national public broadcasting programs, not only “controversial programs” or programs that receive CPB funding. Despite statements of senators and representatives to the

---

95. The CPB has announced that the results of programming reviews by “expert” panels, to be conducted in 1994, “will be an important factor in CPB programming grants.” *Id.* at 15.

96. Pub. L. No. 102-356, § 19, 106 Stat. 949, 955-56 (1992). The CPB was given an “extension” on filing its first report, due in January 1993, and submitted it to Congress on January 31, 1994. *See* 1994 CPB REPORT TO CONGRESS, *supra* note 94. The 1994 Report concluded: “[N]o glaring or egregious pattern of bias, social slant or partisan predisposition has surfaced in CPB’s year-long opinion soundings, including its statistically valid opinion survey.” *Id.* at 18. Only 13% of respondents to the CPB’s national survey indicated that they felt public television programming was “biased.” *Id.* at 13. Notably, 65% of respondents believe that public television should be held to a higher standard of balance and objectivity than other broadcast media. *Id.*

97. Indeed, several senators stated that “[t]his amendment is not intended to restrict, expand, augment, or in any way alter the scope of the CPB’s existing statutory authority, including that authority with regard to objectivity and balance.” 138 CONG. REC. S7342 (daily ed. June 2, 1992) (statement of Sen. Inouye); *see also id.* at S7343 (Sens. Dole and Stevens) (same); *id.* at S7446 (daily ed. June 3, 1992) (statement of Sen. Seymour) (explaining that the “committee amendments do not break new ground or create new policy”).

contrary,<sup>98</sup> this statutory requirement significantly expands the reach of the "objectivity and balance" standard beyond the scope of the 1967 Act.<sup>99</sup> By requiring the CPB to make programming grants<sup>100</sup> based on its review of all national programming on public broadcasting, Congress codified the CPB's role as the "gap filler" for national public broadcasting. CPB's grant decisions are *not* to be internally balanced, by reviewing only the CPB-supported programs, but are to counterbalance whatever public broadcasters produce and acquire from other funding sources. Thus, Congress did not appear concerned about whether programs funded by the CPB reflect a political bias, but rather that the "balance" be struck by comparing the CPB-funded programs against other nationally broadcast public broadcasting programs.

Finally, Congress has authorized the CPB to establish whatever steps "it finds necessary" to meet its statutory mandate.<sup>101</sup> As a result, the CPB is left with tremendous discretion in a context of tremendous ambiguity. While Congress allows the CPB to determine for itself what is meant by "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature," and has granted the CPB the latitude to determine how to meet this objective, the CPB must report to Congress, which controls CPB's purse strings. Thus, senators and representatives have reserved for themselves the power to review the CPB's performance under their own interpretation of this standard. As a result of the ambiguous standard imposed upon distribution of the CPB funds, broadcasters and producers necessarily must guess what the CPB and Congress mean by "objectivity and balance"—guesses that carry ramifications for continued funding.

The 1992 amendment thus transformed the aspirational language of the 1967 Act into an enforceable regulatory standard. The 1967 "objectivity and balance" language allowed Congress to evaluate the overall performance of CPB funding for controversial programming. It did not extend beyond contro-

---

98. See *supra* note 97.

99. See *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1117 (D.C. Cir. 1978) (holding that the "objectivity and balance" provision of 1967 Act applies only to the CPB itself "and even there only to a narrower category of programming dealing with controversial issues").

100. The legislative record of the 1992 amendment reflects significant disagreement among senators over what is meant by "programming grants." Compare 138 CONG. REC. S7342 (daily ed. June 2, 1992) (statement of Sen. Inouye) (arguing that the amendment does not alter way in which the CPB is to distribute national program production and acquisition grants (NPPAGs) for radio) and *id.* at H7264 (daily ed. Aug. 4, 1992) (statement of Rep. Dingell) (contending that the amendment "does not authorize the CPB to impose restrictions of conditions on the use or expenditure of NPPAG grants") with *id.* at S7344 (daily ed. June 2, 1992) (statement of Sen. Dole) ("All programming funds passing through the CPB are subject to the balance and objectivity standard.") and *id.* at S7463 (daily ed. June 3, 1992) (statement of Sen. Dole) (arguing that the amendment applies to all programming of controversial nature distributed by NPR and PBS) and *id.* at S2650 (daily ed. Mar. 3, 1992) (statement of Sen. McCain) (suggesting that even PBS programs not created with public funding should be held accountable to objectivity and balance mandate).

101. "Congress is not requiring the CPB to take any particular action and is leaving the determination of what are appropriate steps to the [CPB] Board." 138 CONG. REC. S7342 (daily ed. June 2, 1992) (statement of Sen. Inouye).

## "Objectivity and Balance" in Public Broadcasting

versial programs or to programming produced without federal funds. The 1992 amendment considerably expanded the scope of that language;<sup>102</sup> now it applies to all national programming, whether controversial or not and whether federally funded or not. As a result, the CPB's role has been recast from that of a funding mechanism and a "heat shield" between Congress and broadcasters to that of a congressionally mandated regulator of public broadcasting programming.

### III. PRACTICAL DIFFICULTIES WITH THE NEW "OBJECTIVITY AND BALANCE" REQUIREMENT

The 1992 amendment raises serious practical problems as well as questions of constitutionality.<sup>103</sup> The 1992 amendment saddles the CPB with the responsibility of enforcing an ambiguous standard, casting it in a role ill-suited to its relationship with producers and broadcasters. The amendment will prove to be not only unworkable and ineffective, but, ultimately, counterproductive.<sup>104</sup>

As the two D.C. Circuit Court decisions discussed above demonstrate, the terms "objectivity and balance" are not sufficiently well defined to serve as a guide for grantmaking decisions.<sup>105</sup> Because the "objectivity and balance" standard is riddled with ambiguity,<sup>106</sup> any "comprehensive policy and set of

---

102. Of course, Congress is free to amend or repeal any of its own legislation, within constitutional bounds. See *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113-14 (1978) ("Congress is generally free to change its mind . . . . But it is bound by the Constitution. The legislative purposes of the 1967 Public Broadcasting Act . . . reflect not only prudential judgment that Congress should not involve itself in the programming decisions of local licensees, but also a constitutional judgment that it *must* not do so.") (emphasis added).

103. The practical difficulties posed by the "objectivity and balance" requirement affect the constitutional analysis, in that an unworkable system of allocating government subsidies will produce unnecessary infringement on free speech values—the paradigm First Amendment violation.

104. This counterproductivity, decreasing rather than enhancing robust debate, is at the heart of the First Amendment "chilling effect" doctrine. See *infra* note 166 and accompanying text.

105. See Note, *Fairer Than Fair?*, *supra* note 80, at 676 (describing objectivity and balance as "an impractical standard which fails to comport with the realities of electronic journalism").

106. Prior to the introduction of the 1992 amendment, some senators demonstrated how difficult it would be to define "objectivity and balance." See, e.g., 138 CONG. REC. S2650 (daily ed. March 3, 1992) (statement of Sen. McCain) (contending that a panel discussion following a controversial program is nothing more than "a thinly veiled attempt to fend off bias charges by offering one or two differing viewpoints"). Further evidence of the lack of consensus regarding what is meant by "objectivity and balance" is provided by the simultaneous criticisms that public broadcasting programming is slanted heavily to the right and to the left. See 1994 CPB REPORT TO CONGRESS, *supra* note 94, at 13 (reporting results of national survey indicating 33% believe public television is too slanted toward liberal positions and 28% believe it is too slanted toward conservative positions). Compare *supra* notes 8-10 (describing attacks from the right) with Jeff Cohen, *PBS Tilts Toward Conservatives, Not the Left*, EXTRA, June 1992 (describing content analysis of MacNeil-Lehrer NewsHour guests conducted by Fairness and Accuracy In Reporting) and Eric Konigsberg, *Stocks, Bonds, and Barney: How Public Television Went Private*, WASH. MONTHLY, Sept. 1993, at 12 (describing how corporate underwriting of public affairs programs on PBS skews coverage towards conservative and pro-business viewpoints).

procedures" that the CPB proposes or attempts to administer as required by law necessarily will embroil it in controversy with public broadcast stations, program producers, and Congress. The CPB already has been, and will continue to be, forced to spend administrative energy, time, and scarce economic resources justifying and defending its actions.<sup>107</sup>

The CPB has faced considerable opposition from within the broadcasting community to its proposals for complying with the amendment. The CPB first attempted to address the requirements of the new amendment at a December 1992 press conference. The CPB suggested that while point-of-view programming should be balanced with other programming dealing with the same issue "over a reasonable period of time," "it is generally desirable that all controversial programs be internally balanced."<sup>108</sup> At the same time, the CPB announced its plans to impanel "independent experts" to review public broadcasting programming and evaluate its "objectivity and balance."<sup>109</sup> In response to these proposals, a coalition of thirty-three separate groups submitted comments to the CPB requesting its reconsideration of these methods.<sup>110</sup>

One month later, the CPB announced revised procedures for program content review, abandoning both the "internal balance within a single program" standard and the plan to subject public broadcasting programming to review by panels of outside "experts."<sup>111</sup> Nevertheless, representatives of the Ameri-

---

107. In April 1993, the CPB allocated \$796,000 to comply with the congressional mandate. However, that amount, drawn from a discretionary fund "which does not affect existing CPB programs," does not cover staff time and other administrative costs associated with the "Open to the Public" campaign. Corporation for Pub. Broadcasting, Press Release, *CPB Provides \$1 Million to American Program Service* (Apr. 6, 1993). The CPB spent \$552,004 on this program in 1993 alone. 1994 CPB REPORT TO CONGRESS, *supra* note 94, at 16.

108. Corporation for Pub. Broadcasting, Press Release, *CPB Proposes "Open to the Public" Campaign, Review of Public Broadcasting Programming* (Dec. 1, 1992). In *Accuracy in Media*, the plaintiff organization had contended that the "objectivity and balance" requirement applied on a program-by-program basis. *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 290 n.4 (1975). This "internally balanced" ideal is contrary to the understanding of the Conference Committee that achieved the final compromises on the Public Broadcasting Act of 1967: "[E]ach program in a series need not meet the test of objectivity and balance, but the series, when considered as a whole, must." H.R. CONF. REP. NO. 794, 90th Cong., 1st Sess. 13 (1967).

109. Corporation for Pub. Broadcasting, Press Release, *supra* note 108. In 1988, the House Subcommittee on Telecommunications and Finance considered and rejected an amendment that would have required each public broadcasting station to establish its own "objectivity and balance review board." In arguing against the amendment, Representative Al Swift (D-Wash.) contended that it would create "a censorship board under the guise of fairness." *Storm Brewing on Hill over CPB Reauthorization*, BROADCASTING, July 18, 1988, at 66.

110. Minceberg & Bacchus, *supra* note 16, at 34. David Salniker, Executive Director of Pacifica Radio, was quoted as saying "I cannot understand what legal right the CPB has to review any program which it did not fund directly . . . . They do not have a legal right to determine what should be on our air." *CPB to Use "Expert" Review Panels in Seeking to Meet Fairness Doctrine*, PUB. BROADCASTING REP., Dec. 4, 1992.

111. Minceberg & Bacchus, *supra* note 16, at 34. The CPB is still planning to use panels of independent experts to review national programming annually. The panels will review any program that receives consistent complaints of bias over the course of a year. If a panel decides that an issue has been presented in a biased or slanted manner throughout an entire year, the CPB will consider funding a program to provide an opposing viewpoint or a broader perspective on the issue. *Board Member Continues Questioning*

## "Objectivity and Balance" in Public Broadcasting

can Civil Liberties Union (ACLU), People for the American Way, and the Pacifica Foundation responded by discussing a possible legal challenge to the CPB's revised proposals.<sup>112</sup> As the CPB continues gathering public feedback about public broadcasting programming through its phone lines and "town meetings," as it prepares and submits its reports to Congress, and as it makes grants in an attempt to satisfy the nebulous "objectivity and balance" requirement, it can anticipate continued bureaucratic snags, congressional interference, and, possibly, legal challenges.

More importantly, given the realities of program production, the CPB simply cannot dictate in advance what the final balance of viewpoints will be in a commissioned program or series of programs.<sup>113</sup> Thus, even if the CPB provides funds for a program produced specifically to balance one that has already aired, the commissioned program will not necessarily provide the requisite balance Congress has demanded. To ensure that the final product will present the precise point of view that the CPB desires would require the CPB or Congress to involve itself in the editorial process, a prospect that few, if any, producers, viewers, or judges would accept.

In fact, because television programs typically take months or years from the initial "seed funding" provided by the CPB until broadcast,<sup>114</sup> the funding mechanism is not an effective means to facilitate a more balanced set of viewpoints on public television. To create "objectivity and balance" on PBS, the CPB would need to base its funding decisions not on last year's balance of PBS programs (which are evaluated in the CPB's reports to Congress), but on what they *predict* the balance will be in one to three years,<sup>115</sup> including programs that are funded entirely by private sources, and thus invisible to the grant reviewers at the CPB. Most importantly, because individual stations still retain the right to decide which programs will air at any given time, and may refuse to air any individual program within a series,<sup>116</sup> the CPB's decisions

---

*CPB Funding*, NEWS MEDIA & L., Summer 1993, at 30-31.

112. Jane Hall, *Public Broadcasting Board OKs Objectivity Measures*, L.A. TIMES, Jan. 27, 1993, at F4. Representatives of the Pacifica Foundation and People for the American Way have adopted a wait-and-see attitude toward the CPB's "objectivity and balance" project. Telephone Interviews with David Salniker, Executive Director of the Pacifica Foundation (Apr. 13, 1993) and Elliott Minceberg, Legal Director of People for the American Way (Apr. 13, 1993).

113. This is particularly true where the CPB provides only a portion of the production's funding needs. The CPB provides only 33% of the average program producer's budget for a program or series of programs. Interview with Jeannie Bunton, *supra* note 49.

114. On average, it takes from 18 months to two years for programs receiving CPB funds to be completed and broadcast. *Id.* Kenneth Burns's award-winning series *The Civil War*, which received CPB funding, took seven years to produce.

115. In 1992, a district court struck down conditions on an advanced funding of programs for the arts, saying, "the content of the expression generated through the grants cannot be known in advance." *Finley v. NEA*, 795 F. Supp. 1457, 1464 (C.D. Cal. 1992).

116. For example, in 1991, more than 200 of PBS's 351 stations chose to not air the program *Tongues Untied*, portraying gay black men's lifestyle in a graphic, sexually explicit manner, when it was available by PBS satellite feed. Nicols Fox, *Many Stations Gag "Tongues Untied,"* WASH. JOURNALISM REV., Sept. 1991, at 14.

either to fund individual balancing programs or to require that series of programs be internally balanced, will not necessarily result in a more balanced presentation on any given television or radio station.<sup>117</sup>

Lastly, it is unclear how, if at all, the CPB can enforce its policy. If, as has been suggested, the CPB commissions a program specifically to balance a program that already has been broadcast,<sup>118</sup> could the CPB impose any sanctions on the commissioned producer if she did not properly emphasize the countervailing viewpoint that the CPB had requested? Requiring that the funds be returned—assuming the producer has or can raise the amount of federal money spent on the production—would impose a penalty for expression of a certain viewpoint. Requiring producers to sign advance pledges to maintain a particular point of view would run afoul of legal precedent prohibiting compelled speech.<sup>119</sup> Thus far, the CPB has said it only will address whatever imbalance it finds by funding more programming, not by imposing negative sanctions.<sup>120</sup> However, Senate Minority Leader Robert Dole, conservative critic David Horowitz, and one CPB Board member have called for negative financial sanctions against broadcasting stations whose programming is deemed imbalanced.<sup>121</sup> This would be analogous to withdrawing public funding from

---

117. Aware of the statutory prohibition on the CPB's authority to "schedule or disseminate" programming, and of the difficulties this posed for realizing objectivity and balance through funding programming alone, public broadcasters predicted a "slippery slope" would follow from the 1992 amendment. In other words, it only would be a matter of time until Congress authorized the CPB to *require* stations to air programs it had funded for the purpose of "balancing" other programming. See *GOP Reauthorization Plan Would Stress CPB Role in Ensuring Program Balance*, COMMUNICATIONS DAILY, May 5, 1992, available in LEXIS, News Library, Curnws File (quoting NPR's director of legislative affairs, Mary Lou Joseph, predicting this "slippery slope").

118. Corporation for Pub. Broadcasting, Press Release, *supra* note 108.

119. See, e.g., *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991) (declaring unconstitutional the NEA's requirement that grant recipients pledge not to produce "obscenity"); see also *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding requirement that automobile drivers display "Live Free or Die" state motto on license plate unconstitutionally compelled speech); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down required pledge of allegiance in public schools).

120. In a letter to the editor, CPB President and CEO Richard Carlson wrote, "[s]ince the only possible result [of the CPB's monitoring efforts] is that more programming will be funded and nothing will be taken off the air, it's ludicrous to argue that the rich diversity of our free press will somehow be reined in." Richard Carlson, *How Broadcast Agency Continues to Guard the Public Interest*, N.Y. TIMES, May 22, 1993, at A18. Apparently, Mr. Carlson conceives his organization as having unlimited funds for programming purposes, such that paying for programs to balance perceived imbalances will have no impact on other program proposals seeking CPB funding. This view ignores the reality of the CPB's woefully limited resources. Money spent to balance a previously run program will not be available to fund other, original programming.

121. In discussing the 1992 amendment on the Senate floor, Senate Minority Leader Dole stated his belief that the "objectivity and balance" language applied to all funds appropriated to the CPB for national programming, including funds distributed for discretionary use by PBS, NPR, and ITVS. "Should the Board members of the CPB determine the standard has not been met, the Board is required to withhold future funds to those organizations . . . ." 138 CONG. REC. S7463 (daily ed. June 3, 1992) (statement of Sen. Dole). In a speech to the Public Radio Conference in May 1993, Dole called upon the CPB to condition its awarding of Community Service Grants (CSGs) to stations on their compliance with the "objectivity and balance" standard, even though by statute the CSGs are not subject to CPB discretion, but are available to any station meeting objective criteria. *PRC Keynote Dole Critical of Public Broadcasting Accountability and Balance*, PUB. BROADCASTING REP., May 21, 1993, available in LEXIS, News Library, Curnws File.

## "Objectivity and Balance" in Public Broadcasting

a museum or public library because the artwork on display or the books on the shelves are considered "unbalanced," even though they were obtained exclusively from private sources.

From a practical standpoint, it is hard to envision how the CPB can fashion and implement any workable "comprehensive policy and set of procedures" for ensuring "objectivity and balance" in public broadcasting programs. Inevitably, in attempting to fulfill the excessively vague congressional mandate, CPB's reports to Congress will do little more than generate greater controversy and provide annual occasions for criticism of the CPB's fiscal management and public broadcasting's alleged political bias. As one public radio executive described the inevitable effect of the 1992 amendment:

It will force the CPB to waste money in a meaningless exercise. It's simply not possible to prove or establish that programming is "objective or balanced." So it won't accomplish anything except to keep the CPB and PBS under a continuing spotlight at each funding renewal . . . That's the problem with the amendment: we gave [our enemies] a club [so they could] continue beating us over the head with it.<sup>122</sup>

## IV. LEGAL CHALLENGES TO THE 1992 AMENDMENT

In addition to the substantial practical problems discussed above, the "objectivity and balance" amendment imposes a content-based condition on the allocation of government subsidies for expressive activities, thereby raising concerns about governmental infringement of the freedom of speech.<sup>123</sup> Because it infringes upon First Amendment values without serving its purported objectives in a sufficiently efficient manner, the 1992 "objectivity and balance"

---

In the Fall 1992 issue of the COMINT newsletter, David Horowitz accused Pacifica radio stations of being "notoriously political entities with a partisan agenda," and he suggested the CPB "should put these stations on notice immediately that they must take steps to conform to the balance doctrine" or they "will be denied further CPB support." *Lack of GOP Participation, Not Imbalance, Seen as Factor in PTV Bias*, PUB. BROADCASTING REP., Oct. 9, 1992, available in LEXIS, News Library, Curnws File. Finally, one CPB Board Member, Victor Gold, tried but failed to convince the rest of the Board to hold CSGs hostage and to impose negative sanctions on Pacifica radio stations for airing programming he categorized as anti-Semitic. *Board Member Continues Questioning CPB Funding*, NEWS MEDIA & L., Summer 1993, at 30-31.

122. Telephone Interview with Ronald Kramer, President of West Coast Public Radio (Nov. 11, 1993).

123. CPB programming grants have always been allocated using content-based criteria. See *supra* text accompanying notes 50-54. Were the CPB deemed to be a completely private entity, no constitutional issues would be raised by CPB grantmaking decisions. Furthermore, even assuming CPB grantmaking is state action, such content-based criteria do not automatically violate the First Amendment. See, e.g., *Advocates for Arts v. Thomson*, 532 F.2d 792, 796, 798 (1st Cir. 1976), cert. denied, 429 U.S. 894 (1976) (reviewing the funding decisions of a state program of subsidies for the arts, and finding that "exercise of editorial judgment by those administering [such a government subsidy program] is inescapable," but is tolerated because it is "counterbalanced by the hope that public funds will broaden the range of ideas expressed"). But see Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719 (1980) (arguing that congressional funding and bureaucratic command structure render all content-based decisionmaking by the CPB and PBS an unconstitutional "prior restraint" on free speech).



amendment is unconstitutional.<sup>124</sup>

*A. First Amendment Values Affected by the "Objectivity and Balance" Amendment of 1992: The Need for Heightened Judicial Scrutiny*

To the casual observer, "objectivity and balance" might appear to be an eminently reasonable standard to guide government funding for speech—one that requires a more complete airing of all viewpoints, thereby enhancing robust public debate and furthering First Amendment values. To understand how a standard so seemingly beneficent can threaten free speech, we need to consider the two First Amendment values that potentially are affected by content-based restrictions.<sup>125</sup> First is the value of autonomous self-expression, the right of speakers to decide what they will say and when they will say it.<sup>126</sup> Requiring public broadcasters to provide "objective and balanced" reporting of controversial issues restricts their editorial autonomy.<sup>127</sup>

The second is the right of the audience to hear diverse views on matters of public importance.<sup>128</sup> Faced with the expense of having to balance controversial programming and with the threatened loss of funding should they transgress an indeterminate boundary, the CPB, program producers, and broadcasters might curtail their coverage of controversial issues. As a result, the vitality of public debate will be diminished. Whether this seemingly neutral, but content-based, restriction enhances or contracts robust public debate is an empirical question that is not easily resolved.<sup>129</sup>

Acknowledging these two potential infringements on First Amendment values, however, does not end the discussion. In the area of broadcasting,

124. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

125. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 704 (1992) (describing "the first amendment's interrelated goals of a robust public debate, an autonomous citizenry, and informed self government"); George Nahitchewansky, Note, *Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like?*, 56 BROOK. L. REV. 213, 226-27 (1990) (discussing tripartite "underlying philosophy" of free speech and concluding "when government seeks to penalize citizens with whom it disagrees, these principles are threatened").

126. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("[O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.").

127. See *FCC v. League of Women Voters*, 468 U.S. 364, 379 (1984) (noting that "broadcasters are engaged in a vital and independent form of communicative activity" and "are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]") (internal quotations and citations omitted).

128. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969):

[T]he people as a whole retain their interest in free speech by radio [and television] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

129. See *infra* text accompanying notes 167-72 (describing the impact of the Fairness Doctrine on robust public debate).

## “Objectivity and Balance” in Public Broadcasting

government may impose a regulation that infringes upon First Amendment rights if the regulation promotes a weighty objective and bears a close fit to that objective, so that no more speech is curtailed than is necessary to pursue the government’s objective.<sup>130</sup> Ordinarily, courts apply “strict scrutiny” to a content-based regulation: Under this standard, a regulation will be considered constitutional only if it is “narrowly tailored” to further a “compelling” government objective.<sup>131</sup>

The “objectivity and balance” amendment is undoubtedly a content-based restriction. It requires enforcement authorities, either the CPB or Congress, to determine if a nationally distributed program is “controversial.” Any “controversial” program must then be judged to determine if it is “balanced” and “objective.”<sup>132</sup> Hence, the 1992 amendment poses “the risk of an enlargement of government control over the content of broadcast discussion of public issues,”<sup>133</sup> triggering “strict scrutiny.”

Heightened judicial scrutiny is particularly appropriate where, as here, a government regulation affects the discussion of issues of public importance, an area of speech the Supreme Court has recognized as lying “at the heart of First Amendment protection.”<sup>134</sup> Indeed, the Supreme Court has stated that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>135</sup> Therefore, when reviewing a restriction affecting expression on issues of public importance, courts “must be especially careful in weighing the interests that are asserted in support of [the] restriction and in assessing the precision with which [it] is crafted.”<sup>136</sup>

---

130. See *Action for Children’s Television v. FCC*, No. 93-1092, No. 93-1100, 1993 U.S. App. LEXIS 30125, at \*13, (D.C. Cir. Nov. 23, 1993) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)) (“[T]he government may ‘regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.’”).

131. *Id.*; *Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530, 540 (1980). When a restriction fails strict scrutiny because it is not “narrowly tailored” to the objective sought, the restriction is said to be “overbroad” with respect to its objective. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 1191-202 (12th ed. 1991) (discussing the First Amendment doctrines of “overbreadth,” “vagueness,” and “least restrictive means”).

132. See *League of Women Voters*, 468 U.S. at 383 (holding a ban on editorializing by public broadcasters is a content-based restriction because “enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern ‘controversial issues’”); see *infra* note 162 (discussing the Supreme Court’s particular antagonism toward laws requiring government officials to review “viewpoint”).

133. *Id.* at 364, 379-80 (quoting *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 110, 126 (1973)); see *CBS*, 412 U.S. at 145-46 (Stewart, J., concurring) (“Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that ‘fairness’ was far too fragile to be left for a Government bureaucracy to accomplish.”).

134. *League of Women Voters*, 468 U.S. at 381. Speech concerning the discussion of issues of public importance is “entitled to the most exacting degree of First Amendment protection.” *Id.* at 375-76.

135. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The 1992 Amendment imposes a content-based restriction on “that form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is ‘indispensable to the discovery and spread of political truth.’” *League of Women Voters*, 468 U.S. at 383 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

136. *League of Women Voters*, 468 U.S. at 383.

## B. The "Unconstitutional Conditions" Doctrine

When government attaches conditions to the allocation of subsidies, its actions are not always subject to the rigid "strict scrutiny" applied to regulations which directly proscribe speech activities. After all, if the government can completely withdraw its subsidy, should it not be permitted to place whatever reasonable conditions it chooses upon those subsidies? Defenders of the 1992 "objectivity and balance" amendment might claim that since Congress can withdraw all federal funding from public broadcasting, it can impose whatever conditions it pleases on those funds.<sup>137</sup> Consequently, they would argue, content-based conditions on government funds should not be subjected to heightened judicial scrutiny; they need only be "rationally related" to some legitimate government objective.<sup>138</sup>

Such a view of content-based conditions on government subsidies, however, is oversimplified and inconsistent with judicial precedent. Even if Congress may withdraw all funding for public broadcasting,<sup>139</sup> it is not free to put whatever content-based conditions it chooses on its subsidies. The Supreme Court has developed an "unconstitutional conditions" doctrine which states that the government cannot produce results indirectly, through conditions on subsidies, that it could not constitutionally effect through direct regulation.<sup>140</sup> Perhaps the clearest articulation of the doctrine was in *Perry v. Sindermann*, in which the Supreme Court ruled that denying tenure to a state university

---

137. This was the view argued by legal counsel to the Carnegie Commission: "There would be no penalty involved in [the CPB's] rejecting a producer's work. Programs not found acceptable for support by the Corporation would not be suppressed. They would be available for dissemination through other means." CARNEGIE I, *supra* note 20, at 132 (citations omitted). In 1993, James Whittinghill, Deputy Chief of Staff for Senator Robert Dole, echoed this sentiment, telling attorneys for public radio stations that the "First Amendment doesn't apply [to the objectivity and balance amendment] because [the] federal government can make awarding of grants conditional on satisfying specified requirements." *PRC Keynote Dole Critical of Public Broadcasting Accountability and Balance*, PUB. BROADCASTING REP., May 21, 1993, available in LEXIS, News Library, Curnws File.

138. This standard of judicial review, known as "rational basis" review, is applied when no fundamental constitutional right is implicated. See *League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting) (arguing that "we need only find that the condition imposed has a rational relationship to Congress's purpose in providing the subsidy"); *id.* at 409 (Stevens, J., dissenting) (same).

139. "The right to repeal . . . [the Public Broadcasting Act] at any time is expressly reserved." 47 U.S.C. § 396(j) (1988). *But see supra* note 58 (presenting argument that government funding for public broadcasting is constitutionally mandated).

140. The government is not permitted to place conditions on benefits in order to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). For a discussion of the "unconstitutional conditions" doctrine, see Cole, *supra* note 125; Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthouse*, 65 N.Y.U. L. REV. 247 (1990).

## “Objectivity and Balance” in Public Broadcasting

professor because he had criticized the university administration infringed upon his First Amendment right to free speech:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny . . . the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”<sup>141</sup>

The jurisprudence surrounding conditions upon government subsidies unfortunately has produced two very distinct lines of cases, with markedly different approaches to which standard of review courts should apply to such conditions. Where courts consider a denial of government benefit to be merely a decision not to subsidize a certain activity (a “non-subsidy” case), the Court has applied only the most lax form of scrutiny.<sup>142</sup> However, in another line of cases, the Court instead has applied the unconstitutional conditions doctrine and examined conditions on government benefits more closely.<sup>143</sup>

Exactly where denial of, or conditions upon, a government subsidy becomes a form of regulation, triggering heightened judicial scrutiny, is a question that continues to perplex judges and scholars alike.<sup>144</sup> Ideas such

---

141. 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). As the D.C. Circuit Court has stated succinctly, “while the Government is not required to provide federal funds to broadcasters, it cannot condition receipt of those funds on acceptance of conditions which could not otherwise be constitutionally imposed.” *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978).

142. See *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe on the right, and thus is not subject to strict scrutiny.”); see also *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 n. 5 (1991) (“Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.”); *Lyng v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America*, 485 U.S. 360 (1988) (holding condition on government food stamps is decision not to subsidize labor strikes); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that condition on federal Medicaid program is decision not to subsidize abortion); *Maher v. Roe*, 434 U.S. 462 (1977) (same for state-subsidized abortions); see also Peter M. Brody, *The First Amendment, Governmental Censorship, and Sponsored Research*, 19 J.C. & U.L. 199 (1993) (discussing the “non-subsidy doctrine” line of cases).

143. Applying heightened scrutiny, the Supreme Court has invalidated conditions on a variety of government benefits. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down a condition prohibiting public broadcasters who receive federal funding from engaging in on-air editorializing because it was not “narrowly tailored” to serve a “substantial” governmental interest); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax exemptions); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare payments); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemptions).

144. Justice Blackmun described the unconstitutional conditions doctrine as “a troubled area of our jurisprudence.” *Rust*, 111 S. Ct. at 1779 (Blackmun, J., dissenting); see also Richard Epstein, *supra* note 140, at 6 (describing the unconstitutional conditions doctrine as “the basic structural issue that for over a hundred years has bedeviled courts and commentators alike”); Beverly M. Wolff, *Government Funding of the Arts: Content-Based Regulations and Unconstitutional Conditions*, 15 COLUM.-VLA J.L. & ARTS 47, 63 (1990) (“[T]he Court’s decisions in the area of the conditioning of benefits on funding have been

as "coercion" or "leverage" have been suggested to help draw the distinction between "offers" and "penalties,"<sup>145</sup> but all of these theories ultimately are unsatisfactory at drawing the line clearly or consistently.<sup>146</sup>

The Supreme Court attempted to articulate a theory for differentiating between "non-subsidies" and "unconstitutional conditions" in the case of *Rust v. Sullivan*.<sup>147</sup> In *Rust*, the Court upheld, against a First Amendment challenge, the so-called "gag rule" that prohibited doctors in Title X-funded family planning clinics from counseling about or advocating abortion.<sup>148</sup> Writing for the Court, Chief Justice Rehnquist defined "unconstitutional conditions" on government funds as those which "[place] a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."<sup>149</sup> Because the Court found that the "gag rule" regulation did not affect the ability of doctors to advocate for, refer, or counsel about abortion outside of their work in clinics receiving Title X funds, it held that the restriction presented no abridgment of doctors' free speech rights.<sup>150</sup>

Of course, the crucial question, unanswered by the *Rust* decision, is how courts are to define the scope of the government-funded project. If the government is free to define the scope of the projects it funds broadly enough to subsume nonfunded activities, it can apply substantial pressure to recipients of government benefits without encountering any constitutional constraint.<sup>151</sup>

---

a hodgepodge. There is no consistent theory as to when a condition can or cannot be imposed, and no consistency in the standard of review applied.").

145. See Kreimer, *supra* note 140, at 1351-59.

146. See Cole, *supra* note 125, at 698-702 (reviewing alternative theoretical conceptions of the unconstitutional conditions doctrine offered by Sullivan, Kreimer, and McConnell and finding none of them satisfactory "for adjudicating first amendment funding challenges"). Cole's persuasive thesis is that by focusing only on speakers' rights, "[t]he unconstitutional conditions doctrine does not address [the] audience-based first amendment concerns, and therefore it provides an incomplete and often misleading standard for reviewing government funding of speech." *Id.* at 680.

147. 111 S. Ct. 1759 (1991). See generally Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185 (1992).

148. 42 C.F.R. §§ 59.8-.10 (1991). President Clinton rescinded the "gag rule" upheld in *Rust* on his second day in office. Memorandum on the Title X "Gag Rule" 29 WEEKLY COMP. PRES. DOC. 87 (Jan. 22, 1993).

149. *Rust*, 111 S. Ct. at 1774. The *Rust* Court also laid out a second set of standards that apply to subsidies within "traditional spheres of free expression." *Id.* at 1776; see *infra* Part IV. E.

150. *Rust*, 111 S. Ct. at 1775 ("[T]he employees remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project.").

151. "Under the [*Rust*] majority's reasoning, the First Amendment could be read to tolerate any governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past." *Rust*, 111 S. Ct. at 1783 (Blackmun, J., dissenting). In *Rust*, the majority permitted the government to define the confines of the Title X project to include activities receiving no federal funding. The Court distinguished the prohibitions imposed in *Rust* from the editorial ban on public broadcasting stations at issue in *League of Women Voters*. According to the Court, while doctors in Title X clinics were free to advocate for or counsel patients about abortion outside the confines of the Title X clinic, in *League of Women Voters*, public broadcasting stations receiving as little as one percent of their funds from the CPB were strictly forbidden

## “Objectivity and Balance” in Public Broadcasting

In the CPB context, program producers and television stations are incapable of segregating those activities receiving federal funds from those that receive none.<sup>152</sup> Therefore, even under *Rust*’s ill-defined and overly restrictive standard, the “objectivity and balance” amendment unconstitutionally infringes upon the free speech rights of grant recipients outside the funded program.<sup>153</sup>

The *Rust* standard lends credence to the proposition that the greater the degree of control that a government funding decision has upon the subsidy recipient’s ability to exercise free speech rights, the more likely it is that courts will subject such a condition on subsidies to heightened scrutiny.<sup>154</sup> Even though the federal government currently provides only twenty-one percent of public broadcasting’s funds,<sup>155</sup> CPB funding decisions carry tremendous influence on producers and broadcasters alike.<sup>156</sup> CPB “seed funding” grants often serve as the pivotal make-or-break hurdle for a program producer, allowing her to obtain substantial funding from other sources.<sup>157</sup> Thus, the threat that the government will deny a subsidy, either by Congress cutting its funding for the CPB or by the CPB refusing a grant to a producer or station, clearly is a powerful tool for “leveraging” the public broadcasting community

---

from editorializing, even if no CPB funds were used to pay for the editorials. *FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984). Justice Brennan stated that were it possible for public broadcasters to segregate their activities according to the source of funding, the editorializing ban would have been upheld. *Id.* Similarly, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Court upheld a prohibition on lobbying by organizations that receive tax-exempt donations because the beneficiaries of this government “subsidy” were capable of segregating funding by establishing a separate organization that was not tax-exempt under § 501(c)(3), and thus, was not prohibited from engaging in lobbying activities.

152. See *supra* note 113 (describing how a typical television program is funded only partially by CPB grants). This understanding was central to the Court’s striking down of the editorial ban on public broadcasters in *League of Women Voters*, 468 U.S. at 400 (distinguishing *Taxation With Representation* because here “a station is not able to segregate its activities according to the source of its funding”).

153. Using this same analysis, a district court has struck down the “indecentcy” standard as a condition upon NEA funding: “Any statutory content control over an NEA-supported program or project necessarily imposes restrictions over a substantial portion of non-NEA-funded expression.” *Finley v. NEA*, 795 F. Supp. 1547, 1472 n.18 (C.D. Cal. 1992).

154. See *Nahitchevansky*, *supra* note 125, at 232 (“Determining whether an organization’s First Amendment rights have been violated by the government’s use of funds requires that the impact of the funding decision on the organization be carefully evaluated.”).

155. In 1992, approximately 14% of public broadcasting’s revenues came from federal appropriations to the CPB. An additional 6.9% comes through direct federal funding (for example, through the National Endowment for the Arts and the National Endowment for the Humanities). CORPORATION FOR PUB. BROADCASTING, PUBLIC BROADCASTING INCOME FISCAL YEAR 1992 Fig. 5 (1993).

156. Every nationally distributed program on public television receives some amount of CPB funding. Interview with Jeannie Bunton, *supra* note 49.

157. CPB grant decisions send powerful messages throughout the public broadcasting community. See CPB 1991 ANNUAL REPORT, *supra* note 41, at 40-41 (“CPB money both mobilizes the system’s resources and serves as an endorsement that attracts an array of additional funding. For one thing other prospective funders . . . view congressional funding channelled through the CPB as a mark of a project’s viability.”); *id.* at 41 (describing “multiplier” and “leverage” effect of CPB funding). In recent years, CPB grants have attracted more than six dollars of private funding for every CPB dollar invested. CPB 1997 APPROPRIATION REQUEST, *supra* note 49, at 3.

to respond to the incentive structure.<sup>158</sup> As the D.C. Circuit Court has stated, “[w]here government licensing and regulation is premised on the scarcity of a medium of communications, then even non-coercive and seemingly voluntary contracts or grants by which government uses that medium to express or enforce a point of view must be strictly scrutinized.”<sup>159</sup>

Because of the powerful pressure that CPB funds exert upon the public broadcasting community, conditions on CPB funds should be viewed more as a form of threat or indirect regulation than as a mere subsidy. Accordingly, under the unconstitutional conditions doctrine, any congressionally imposed conditions that may infringe on the First Amendment rights of program producers, stations, or the CPB, and on the audience’s right to receive robust public debate, should be subjected to heightened judicial scrutiny: The condition must be “narrowly tailored” to serving a “substantial government interest.”<sup>160</sup> Applying this level of scrutiny, the 1992 “objectivity and balance” amendment fails to pass constitutional muster. It is not sufficiently narrowly tailored to its purported objectives: to promote more robust public debate by ensuring presentation of multiple views and perspectives,<sup>161</sup> and to avoid the appearance that, through the public expenditure of public funds on speech, the government is “taking sides” in the political debate to influence or determine the outcome.<sup>162</sup>

---

158. See Sullivan, *supra* note 140, at 1489; Note, *Standards for the Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969, 1981-82 (1990); see also Nahitchkevansky, *supra* note 125, at 250-51 (describing how “government can further regulate expression by applying indirect pressure on grant administrators”). The influence and pressure exerted on PBS is substantial—while the CPB provides only 15% of PBS funding needs through direct support, 100% of prime-time programs on PBS receive some funding from the CPB. Interview with Jeannie Bunton, *supra* note 49. Furthermore, the bulk of PBS’s funding comes from public television stations that receive funding from the CPB Community Service Grants. Therefore, “[t]hrough nominally independent and self-governing, PBS may be subject to influence by the CPB, primarily because most of PBS funds are provided by the CPB.” Chase, *supra* note 93, at 77. Thus, federal funding produces a profound impact on the public broadcasting program schedule.

159. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 n.17 (1978).

160. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). Heightened scrutiny is also appropriate where, as here, the burden of proving that the statutory standard has been met is placed upon the recipient (the CPB). See *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (requiring applicant to prove his loyalty encourages self-censorship and “can only result in deterrence of speech that the Constitution makes free.”).

161. See 138 CONG. REC. S7441 (daily ed. June 3, 1992) (statement of Sen. Dole) (stating that the purpose of the “objectivity and balance” amendment is to promote nothing more than “fair play”).

162. The prohibition against government using financial incentives to favor one viewpoint over another is well established. “Whatever may be the Government’s power to condition the receipt of its largesse upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient’s cherished freedoms of speech based solely upon the content or viewpoint of that speech.” *Rust v. Sullivan*, 111 S. Ct. 1759, 1780 (1991) (Blackmun, J., dissenting) (citing *Speiser*, 357 U.S. 513 (1958)); see also *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221 (1987) (striking down a state sales tax exemption that discriminated between magazines based on their content). Even the two dissenters in *Arkansas Writers’ Project*, Justice Scalia and Chief Justice Rehnquist, agreed that strict scrutiny was appropriate “when the subsidy pertains to the expression of a particular viewpoint on a matter of public concern.” *Id.* at 237 (Scalia, J., dissenting).

## “Objectivity and Balance” in Public Broadcasting

### *C. The Government's First Purported Goal: Enhancing Robust Public Debate*

It is not readily demonstrable whether requiring “objectivity and balance” in all nationally broadcast controversial programs will expand or contract public debate. Lacking empirical data, it is informative to consider the impact of a similar broadcasting policy aimed at the same goal: the Fairness Doctrine.

The Fairness Doctrine is a series of regulations promulgated, but no longer enforced, by the FCC against all broadcast licensees.<sup>163</sup> It imposed two related requirements on all broadcast licensees: (1) to devote a reasonable portion of programming to discussion of controversial issues of public importance and (2) to do so in a way that fairly presented contrasting viewpoints on those issues.<sup>164</sup> In 1969, in *Red Lion Broadcasting Co. v. FCC*,<sup>165</sup> the Supreme Court upheld the constitutionality of two of the Fairness Doctrine regulations relating to political candidates who were the subject of on-air personal attacks and to political editorials. However, the Court explicitly reserved the right to revisit the constitutionality of the Fairness Doctrine should regulatory experience with the doctrine demonstrate that it has “the net effect of reducing rather than enhancing” the vitality of public debate.<sup>166</sup>

Beginning in 1987, the FCC discontinued its enforcement of the Fairness Doctrine, because under the direction of Reagan Administration appointees Mark Fowler and Dennis Patrick, the Commission had determined that the doctrine disserved the public interest by “chilling” broadcasters coverage of controversial issues.<sup>167</sup> The argument put forth by the FCC, and accepted by the D.C. Circuit Court in *Syracuse Peace Council v. FCC*,<sup>168</sup> was that

---

163. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369 (1969); Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,371, 26,374 (1974); Applicability of Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,416 (1964); see also T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA* (3rd ed. 1993) 259-313 (discussing the origin, evolution, and constitutional status of the Fairness Doctrine).

164. See Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,372 (1974). The Fairness Doctrine, an FCC-promulgated regulation, was distinct from the statutory requirement on all licensees to provide “equal time” to all qualified candidates for political office. 47 U.S.C. § 315 (1988). See *Red Lion*, 395 U.S. at 369-70 (discussing distinction between Fairness Doctrine and equal time provision).

165. 395 U.S. 367 (1969).

166. *Id.* at 393. Thus, *Red Lion* decided only that the Fairness Doctrine was constitutionally *permissible*, not that it was required. Furthermore, the Court gave only cautious approval to the doctrine, reserving the right to review its actual effect on the public’s “paramount right” to receive a robust public debate on matters of public importance: “[S]hould licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.” *Id.*

167. See *Syracuse Peace Council v. WTVH*, Memorandum and Order, 2 FCC Rec. 5043 (Aug. 6, 1987). The FCC found:

[T]he fairness doctrine in operation disserves both the public’s rights to diverse sources of information and the broadcaster’s interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that . . . the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

*Id.* at 5052.

168. 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).



the Fairness Doctrine no longer could be understood to serve "the public interest" because it was counterproductive: It resulted in less robust discussion, not more.<sup>169</sup> The D.C. Circuit Court did not rule on the constitutionality of the Fairness Doctrine, but accepted the FCC's policy as a reasonable exercise of administrative discretion.<sup>170</sup> However, Judge Starr's concurrence, citing *Red Lion's* ominous caveat of potential future review,<sup>171</sup> argued that the Fairness Doctrine was unconstitutional, because it infringes upon the speaker's autonomy without producing any offsetting speech benefit.<sup>172</sup>

Supporters of the 1992 amendment might argue that "strict adherence to objectivity and balance" means nothing more than the Fairness Doctrine's requirement of fairness and general balance of viewpoints that the Supreme Court upheld in *Red Lion*.<sup>173</sup> However, "objectivity," the absence of subjective perspective, was never a part of the Fairness Doctrine's standard.<sup>174</sup> Moreover, Congress, cognizant of the Fairness Doctrine in 1967, most likely intended something distinct from, and more stringent than, the general fairness standard of the Fairness Doctrine when it imposed the "objectivity and balance" standard upon the CPB funding for controversial programming.<sup>175</sup> Comments from congressmen who proposed and championed the original "objectivity and balance" language of the 1967 Act indicate that they intended something more than just overall fairness in the totality of programming.<sup>176</sup> Moreover, the language of the "objectivity and balance" provision applies to

169. See *supra* note 167.

170. Nonetheless, in accepting the FCC's finding that the Fairness Doctrine no longer served the public interest, Judge Williams stated: "[W]here a rule imposes potentially onerous and at least irksome consequences on the exercise of speech, there is nothing very startling about an inference that the rule will often deter speech." *Syracuse Peace Council*, 867 F.2d at 664.

171. See *Red Lion*, 395 U.S. at 393 ("[I]f experience with the administration of the doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."); *FCC v. League of Women Voters*, 468 U.S. 364, 378-79 n.12 (same).

172. *Syracuse Peace Council*, 867 F.2d at 677 (Starr, J., concurring) ("There is simply nothing novel about the FCC's determination that, for purposes of evaluating the fairness doctrine, the public interest is 'inextricably intertwined' with the First Amendment.").

173. In the past, PBS interpreted the original "objectivity and balance" provision to be identical to the standard set forth in the Fairness Doctrine. See Note, *Fairer Than Fair*, *supra* note 80, at 655-66.

174. *Id.* at 657 (demonstrating that FCC rulings, memoranda, and regulations concerning the Fairness Doctrine never included any reference to "objectivity"). But see *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973) ("[T]he initial . . . responsibility for fairness, balance, and *objectivity* rests with the licensee.") (emphasis added).

175. Note, *Fairer Than Fair*, *supra* note 80, at 657 (arguing that "objectivity and balance" provision of 1967 Public Broadcasting Act imposed a standard more stringent than the Fairness Doctrine); Branscomb, *supra* note 89, at 23-25 (same).

176. See Note, *Fairer Than Fair*, *supra* note 80, at 654-61 ("Congress cannot be presumed to have used objectivity and balance as a synonym for the fairness doctrine . . . . [I]t is reasonable to conclude that the objectivity and balance language of 47 U.S.C. § 396(g)(1)(A) imposes a heavier burden of 'fairness' on the CPB than that of the fairness doctrine . . . ."); see, e.g., *id.* at 659 n.83 (quoting statement of Congressman Springer, House sponsor of the 1967 Act, and author of the "objectivity and balance" provision, during 1972 congressional hearings) ("Now this is not the same as the rule applicable to commercial television . . . You understand, there is a lot more than just fairness here. We went over this with a fine-tooth comb. This has a lot more to do than with just fairness.").

## "Objectivity and Balance" in Public Broadcasting

"all programs or *series of programs*" of a controversial nature.<sup>177</sup> This means, for example, that a series like "Eyes on the Prize," a nationally distributed documentary series on the civil rights movement, would not satisfy the "objectivity and balance" requirement unless the series included the white supremacist perspective on blacks in America. Certainly this is stricter than the Fairness Doctrine, which looked to a station's overall programming.<sup>178</sup> Lastly, the "objectivity and balance" provision applies to all controversial programming, whether or not such programming concerns "issues of public importance," to which the Fairness Doctrine was limited.<sup>179</sup>

Thus, both the substantive standard and the scope of the "objectivity and balance" amendment suggest a greater intrusion of governmental oversight of broadcasters' editorial decisionmaking than the Fairness Doctrine. Indeed, the D.C. Circuit Court has stated that because "objectivity and balance" is a stricter standard than the Fairness Doctrine, imposing this standard on public broadcasters "would raise serious constitutional questions, particularly in light of the Supreme Court's cautious approval of the more limited fairness doctrine."<sup>180</sup>

If the Fairness Doctrine is deemed unconstitutional, then *a fortiori* the "objectivity and balance" amendment is as well. Even if the Fairness Doctrine is rejected exclusively on administrative policy grounds,<sup>181</sup> the constitutional argument that has been mounted against it applies with even greater force to the more restrictive standard of the "objectivity and balance" amendment: It chills more speech than it brings into existence, thereby reducing the overall

---

177. 47 U.S.C. § 396(g)(1)(A) (1988).

178. Cf. Letter from FCC Complaints & Compliance Division to K.M. Byndrian, WPHR(FM), Jan. 28, 1971, 8310-K, C6-1041 ("The fairness doctrine does not require all significant views on an issue be presented in one program or *series of programs*; but rather the licensee meet his fairness doctrine obligations in his overall programming.") (emphasis added).

179. See Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,371, 26,375 (1974) (discussing what constitutes "issues of public importance"). The Fairness Doctrine was generally understood to apply only to nonfiction programming, but the 1992 "objectivity and balance" amendment arguably applies to fiction or dramatic programs. An example of how dangerous it is to apply the "objectivity and balance" standard to such programming is provided by the Texaco Corporation's decision, in June 1992, to withdraw its \$2 million of annual funding for PBS's *Great Performances* series in reaction to a single program, *The Lost Language of Cranes*, which portrayed a father and son confronting their homosexuality. A Texaco spokesman said his company's withdrawal of funding for the entire series was based upon discovering that the series "was moving away from the traditional and classical works with which Texaco wants to be associated." Joyce Price, *Democrats Seek Deal on Public Broadcast Funds*, WASH. TIMES, Apr. 19, 1992, at A11.

180. Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1117 (D.C. Cir. 1978); see also Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 296-97 (D.C. Cir. 1975) (finding that enforcement of "objectivity and balance" instead of the Fairness Doctrine might require the FCC to conduct a more expanded "inquiry into the factual accuracy of programming" resulting in a "potential enlargement of government control of programming" which would "threaten to upset the constitutional balance struck in [CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973)]."), *cert. denied*, 425 U.S. 934 (1976).

181. In June 1987, President Reagan vetoed Congress's attempt to codify the Fairness Doctrine. Ronald Reagan, Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715-16 (June 19, 1987).

breadth of the public debate. Thus, "the public's paramount right to be fully and broadly informed on matters of public importance through the medium of non-commercial educational broadcasting is not well served by the restriction, for its effect is plainly to diminish rather than augment the volume and quality of coverage of controversial issues."<sup>182</sup>

*D. The Government's Second Goal: Avoiding Government-Funded Propaganda*

Even acknowledging the likely net reduction in robust debate described above, and the infringement on the autonomous self-expression rights of CPB, producers, and broadcasters, the "objectivity and balance" amendment still might survive judicial review if these costs were found to be justified by Congress's second purported objective—guarding against the government allocating subsidies in order to skew or dominate the public debate.

The "objectivity and balance" amendment, however, fails the heightened scrutiny test, because it is not "narrowly tailored," but rather is at once "overbroad" and "underinclusive" with respect to this objective.<sup>183</sup> First, by requiring the CPB to monitor and report on "all national programming" on public broadcasting, the amendment sweeps into its gambit a substantial amount of speech that receives little or no funding from the federal government.<sup>184</sup> By requiring the CPB to make its grant decisions based upon its review of programs receiving no federal funds,<sup>185</sup> the 1992 amendment is "overbroad" with respect to the purported objective of ensuring that government funds are not used to favor one viewpoint over another.

Moreover, Congress had already imposed a "less restrictive" means of accomplishing the same objective. In the 1992 legislation, Congress adopted a Senate Commerce Committee amendment requiring the CPB to prepare an annual public report listing "each organization that receives a grant from the Corporation to produce programming, the name of the producer of any programming produced under each such grant, the title or description of any program so produced, and the amount of each such grant."<sup>186</sup> This was viewed

---

182. *FCC v. League of Women Voters*, 468 U.S. 364, 399 (1984) (internal quotations omitted).

183. See GUNTHER, *supra* note 131, at 1191-200 (discussing the origins and development of the First Amendment "overbreadth" doctrine); see also *League of Women Voters*, 468 U.S. at 385 n.16 (discussing the underinclusiveness of the ban on editorializing by public broadcasters for government's purported objective of preventing use of taxpayer money to promote private views with which certain taxpayers disagree).

184. Because federal funds account for only a fraction of the costs of producing most programs, establishing a content requirement on an entire program or series of programs affects far more privately funded speech than government-funded speech. Of course, government-funded and privately funded speech are inseparable within individual programs.

185. See *supra* text accompanying notes 98-100.

186. Pub. L. No. 102-356, §§ 7 & 14, 106 Stat. 949, 951, 953-54 (1992) (codified at 47 U.S.C.A. § 396(i)(1) (West Supp. 1992)). Unlike the broader mandate of the "objectivity and balance" amendment, "this requirement only binds those programs directly funded by the CPB." S. REP. NO. 221, 102d Cong.,

## “Objectivity and Balance” in Public Broadcasting

as a limited infringement on the CPB, yet sufficient to “facilitate the process of determining whether CPB is in conformance with its congressional mandate requiring balanced programming.”<sup>187</sup> Hence, the last minute addition of the “objectivity and balance” amendment on the Senate floor was both redundant with respect to the Commerce Committee’s amendment and overbroad with respect to the government’s purported objective.<sup>188</sup>

Second, because local stations retain the right to select which programs to air, altering the CPB funding decisions in an attempt to balance non-CPB funded programs will not necessarily produce a more balanced presentation to any PBS viewer or NPR listener. Even a CPB decision to commission a program rebutting a previously aired show will not necessarily produce “objectivity and balance” on any given television or radio station.<sup>189</sup> Thus, the 1992 amendment is not sufficiently narrowly tailored to its purported objective because the results it aims to achieve are, at best, speculative.<sup>190</sup>

The “objectivity and balance” amendment is also “underinclusive” in its goal of ensuring that the public broadcasting audience does not perceive that government is taking sides in the public debate. Because the viewer cannot easily discriminate between nationally distributed programs and locally produced programs, she is unlikely to recognize whether there is balance only in the nationally distributed programs, as the 1992 amendment requires. Any single station may air a bevy of locally produced programs and programs received from non-nationally distributed sources, which present an extremely lopsided, biased account on any number of controversial issues. In such a case, the viewer or listener would not be able easily to discern which programs were nationally distributed and thus represented “the government’s view,” and which were locally produced or distributed. Hence, by requiring the CPB to monitor and attempt to balance *only* nationally distributed programming, the 1992 “objectivity and balance” amendment is underinclusive with respect to its purported objective of prohibiting the appearance of imbalance on publicly funded broadcasting stations.

Lastly, a less restrictive means to achieve the purported objective of the

---

1st Sess. 16 (1991); see also 138 CONG. REC. S2652 (daily ed. Mar. 3, 1992) (statement of Sen. McCain) (explaining that this reporting requirement was intended to allow “Congress and the American people [to] begin to closely monitor the programs to ensure that the mandate of providing balanced viewpoints is met”).

187. S. REP. NO. 221, *supra* note 186, at 16.

188. See *FCC v. League of Women Voters*, 468 U.S. 364, 398 (1984) (“Since the breadth of [the ban on editorializing by public broadcasters] extends so far beyond what is necessary to accomplish the goals identified by the Government, it fails to satisfy the First Amendment standards that we have applied in [the area of broadcast regulation].”).

189. See *supra* notes 113-17 and accompanying text.

190. As the Supreme Court said in *League of Women Voters*, “sacrifice of First Amendment protections for so speculative a gain is not warranted.” 468 U.S. at 397 (quoting *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 127 (1973)).

1992 amendment is readily available.<sup>191</sup> A brief disclaimer at the beginning or end of any show receiving federal funds would address the concern that audience members might perceive that government is "taking sides," without imposing the same "chilling effect" that results from government evaluation of program content and viewpoint.<sup>192</sup> Thus, for all of the above reasons, the 1992 "objectivity and balance" amendment is not sufficiently "narrowly tailored" to its purported objectives to withstand heightened judicial scrutiny.<sup>193</sup>

*E. The Additional Requirement for Conditions on Government Funding in Fora Dedicated to Free Expression*

In addition to the ill-defined "project-grantee" test which is applicable to all government subsidies, the Court in *Rust v. Sullivan* announced a second set of constraints, applicable only to government subsidies within "traditional sphere[s] of free expression . . . fundamental to the functioning of our society."<sup>194</sup> In these areas, the Court declared, "the Government's ability to control speech . . . by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."<sup>195</sup>

Like the "project-grantee" test, there is much confusion and disagreement over what constitutes a "traditional sphere of free expression." The *Rust* opinion suggests that the academic freedom of the university setting is the paradigmatic example of such a sphere, but Chief Justice Rehnquist's opinion also mentions areas that have been "expressly dedicated to speech activity."<sup>196</sup> Since the *Rust* decision, district courts have struck down as unconstitutionally vague conditions on government subsidies in areas deemed "traditional sphere[s] of free expression": the arts and university-based scientific

---

191. See *League of Women Voters*, 468 U.S. at 395 ("[the government's objective] can be fully satisfied by less restrictive means that are readily available.").

192. To assist audience members in differentiating privately funded from publicly funded programs, Congress in 1992 required CPB-funded programs to contain a disclosure statement indicating that federal funds were provided through the CPB. Pub. L. No. 102-356, § 14, 106 Stat. 949, 953-54 (1992) (codified at 47 U.S.C.A. § 396(l)(4) (West Supp. 1992)); see 138 CONG. REC. S7344-45 (daily ed. June 2, 1992) (debate regarding amendment "to require disclosure of Federal funding of public television programs"); *id.* at S7344 (statement of Sen. Inouye):

The Corporation should be careful not to specify credit wording that could, in any way, be misconstrued by viewers to mean that the program they have just seen was in any way influenced by the Federal Government. . . . [G]reat care must be taken to preserve the impression, as well as the fact, that programs aired on public television stations are free from Governmental interference of control.

193. As the Supreme Court said of the editorializing ban struck down in *League of Women Voters*, "the restriction is not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgment of speech worked by the [restriction] . . . ." 468 U.S. at 398.

194. *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991).

195. *Id.*

196. *Id.*

## "Objectivity and Balance" in Public Broadcasting

research.<sup>197</sup> To the extent that "programming of a controversial nature" on public broadcasting is considered a "traditional sphere of free expression . . . fundamental to the functioning of our society,"<sup>198</sup> the "objectivity and balance" amendment must conform to the constitutional restrictions imposed upon government subsidies in such spheres.

The vagueness standard to which Chief Justice Rehnquist referred is a long-standing doctrine. A law that imposes penalties for speech is unconstitutional if the standard set forth in the statute is so vague that it requires "all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others."<sup>199</sup> The 1992 amendment imposes an unconstitutionally vague standard to guide either the funding decisions of the CPB or the editorial decisions of program producers and station managers.<sup>200</sup> The CPB, PBS, and Congress all have failed in past attempts to clarify the meaning of "objectivity and balance," and ultimately abandoned any such efforts, recognizing the inevitable chilling effect of imposing such a vague standard.<sup>201</sup> This was implicit in the D.C. Circuit Court's finding in *Accuracy in Media* that "objectivity and balance" could not serve as "a substantive standard, legally

---

197. *Finley v. NEA*, 795 F. Supp. 1457 (C.D. Cal. 1992) (holding unconstitutionally vague the restriction imposed upon artist recipients of NEA grants requiring that the art produced comply with "general standards of decency"); *Board of Trustees of Stanford Univ. v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991) (holding unconstitutionally vague a confidentiality clause as a condition on federally sponsored scientific research); see also *Lebron v. National Railroad Passenger Corp. (AMTRAK)*, 811 F. Supp. 993 (S.D.N.Y. 1993) (billboard art); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278 (S.D.N.Y. 1992) (health education).

198. Indeed, the district court in *Finley*, in stating that art is a "sphere of free expression," also suggested "academic speech or journalism" as paradigmatic examples. 795 F. Supp. at 1473 (emphasis added).

199. *Barenblatt v. United States*, 360 U.S. 109, 137 (1959) (Black, J. dissenting).

200. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court sustained the FCC's Fairness Doctrine against a vagueness challenge. 395 U.S. 367, 395-96 (1969). However, the Court relied upon the FCC's experience with administering the doctrine to cure its ambiguity, *id.*, and the Fairness Doctrine did not mention "objectivity." See *supra* note 174 and accompanying text.

201. In the *Accuracy in Media* case, the CPB recognized the unworkability of the "objectivity and balance" standard, arguing in its brief to the court that it could not serve as a substantive standard because "'objectivity and balance' does not meet constitutional muster under the Court's decisions." Brief for Intervenor Corporation for Public Broadcasting at 24, *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975) (No. 74-1028), *cert. denied*, 425 U.S. 934 (1976). In 1986, responding to criticism and political pressure from congressional conservatives, the CPB requested proposals from 100 social scientists to conduct a content analysis of PBS's programming in terms of "objectivity and balance." *CPB Will Not Pursue Study*, PR NEWswire, Mar. 9, 1987, available in LEXIS, News Library, Arcnws File. After reviewing the submitted proposals, the CPB board decided not to perform this study, finding that none of the proposals were able to define "objectivity and balance" or to suggest how that standard could be applied to the CPB-funded programs. *Id.*; *No Objectivity Study for Public TV*, UPI REGIONAL NEWS, Mar. 6, 1987, available in LEXIS, News Library, Arcnws File. In April 1987, PBS conducted its own analysis and determined that "objectivity and balance" was not a definable standard by which to evaluate programming, and that any attempt to do so "could have a chilling effect on the first amendment rights of public television producers and broadcasters." PUBLIC BROADCASTING SERV., REPORT OF THE SPECIAL COMMITTEE ON PROGRAM POLICIES AND PROCEDURES, 3 App. at 8 (1987); see also *supra* note 109 (discussing 1988 congressional consideration of a proposed requirement that PBS stations evaluate programming for "objectivity and balance" and rejection of that proposal because of foreseeable chilling effect).

enforceable by agency or courts."<sup>202</sup>

The excessively vague "objectivity and balance" standard will chill speech as the CPB or potential program producers self-censor, fearing government sanctions if they transgress an indeterminate boundary.<sup>203</sup> The outcome will be a less robust public debate than would result in the absence of such a restriction. This is the paradigmatic First Amendment violation—a government action that tends to diminish the diversity of ideas available in public discourse.

Exactly how much speech will be "chilled" and, therefore, absent from the public debate as a result of the "objectivity and balance" amendment depends upon the specific mechanisms by which Congress and/or the CPB choose to enforce the vague criterion.<sup>204</sup> However, the danger in imposing a vague standard on speakers' rights (either through direct regulation or through conditions upon subsidies) lies not in how the standard is applied in practice, but how its *potential* application may significantly chill speech.<sup>205</sup> As the D.C. Circuit Court has stated:

In seeking to identify the chilling effect of a statute our ultimate concern is not with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation. Mere passage of a statute which clearly serves the purpose of allowing government officials to review program content on a program-by-program basis . . . is reason enough for local licensees to fear and dilute their public affairs coverage.<sup>206</sup>

Thus, irrespective of how the CPB or Congress chooses to enforce the "objectivity and balance" requirement, the result of imposing such an excessively vague standard upon controversial programming is that the CPB, program producers, and public broadcasters will all "trim [their] sails to abide the prevailing winds,"<sup>207</sup> and the public debate will be curtailed.<sup>208</sup> Consequen-

202. *Accuracy In Media*, 521 F.2d at 297.

203. Vague standards produce a chilling effect by forcing those subject to such sanctions to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958), and to restrict their expression "to that which is unquestionably safe," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1963).

204. See *supra* text accompanying notes 118-21 for discussion of alternative methods of enforcing the "objectivity and balance" provision.

205. "For 'the threat of sanctions may deter . . . almost as potently as the actual application of sanctions.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1962)). Indeed, under a facial challenge, a court need not consider the specific application of the statute. See *Finley v. NEA*, 795 F. Supp. 1457, 1472 (C.D. Cal. 1992) ("On such [a facial] challenge, it is inappropriate to consider the manner in which the agency has interpreted and applied the statute.").

206. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116-17 (D.C. Cir. 1978) (requiring public broadcasters to make and retain for 60 days recordings of programs "of public importance" would inevitably cause station managers and program producers to self-censor, thereby diminishing the vitality of discussion on issues of public importance) (*dicta*).

207. *Id.* at 1123.

208. Without a clear articulation of what is meant by "objectivity and balance" in controversial programming, television program producers applying for CPB funding will be required "to guess just what the law really means to cover, and fear of a wrong guess inevitably [will lead them] to forego the very rights the Constitution sought to protect above all others." *Barenblatt v. United States*, 360 U.S. 109, 137

## “Objectivity and Balance” in Public Broadcasting

tly, the “objectivity and balance” criteria for federal funding of controversial public television programming fails to meet the constitutional standard required of conditions on subsidies in “traditional sphere[s] of free expression . . . fundamental to the functioning of our society.”<sup>209</sup>

### *F. The Possibility that the “Objectivity and Balance” Amendment Was Aimed at the “Suppression of Dangerous Ideas”*

Lastly, the simultaneous overbreadth, underinclusiveness, and impracticability of the “objectivity and balance” amendment raise the concern that congressional sponsors of the 1992 amendment may have had an illegitimate purpose underlying their proposal: to suppress ideas they disfavored. It is well settled that the First Amendment does not permit the government “to discriminate invidiously in its subsidies in such a way as to ‘aim at the suppression of dangerous ideas.’”<sup>210</sup> To determine if such a purpose lay behind the 1992 amendment, it is informative to examine how courts have treated previous congressional efforts to hold the CPB accountable to the 1967 “objectivity and balance” language.

In 1973, concerned with the coverage of government policies on public broadcasting stations, Congress imposed an additional restriction on public broadcasters, allegedly to facilitate holding them accountable to the original “objectivity and balance” requirement. The 1973 CPB reauthorization legislation required public broadcasting stations to make and retain for sixty days recordings of any broadcasts in which “any issue of public importance is discussed.”<sup>211</sup> In *Community-Service Broadcasting of Mid-America, Inc. v. FCC*,<sup>212</sup> the D.C. Circuit Court struck down this recording requirement as a violation of public broadcasters’ equal protection rights.<sup>213</sup> Judge Skelly Wright stated in dicta that “the legislative history of [the amendment] provides

---

(1959) (Black, J., dissenting). Indeed, the May 1992 letter from the CPB to public radio broadcasters advising them to publicize the new “Open to the Public” toll free complaint line because “negative criticism might vindicate a station’s decision not to carry controversial programming,” is a likely omen of things to come. See *supra* note 15. Rather than subject itself to continuing political pressure and possible financial recriminations by attempting to fulfill the vague “objectivity and balance” mandate, the CPB will simply encourage public broadcasters to avoid controversial programming altogether.

209. *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991).

210. *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969) (listing among “serious First Amendment issues” raised by government regulation of programming content, the danger of “the official government view dominating public broadcasting”).

211. Pub. L. No. 93-84, § 2, 87 Stat. 219, 219-20 (1973) (codified at 47 U.S.C. § 399(b)), *repealed* by Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, § 1229, 95 Stat. 725, 730.

212. 593 F.2d 1102 (D.C. Cir. 1978) (en banc).

213. The recording requirement was held to violate equal protection, because it applied only to noncommercial broadcasters, and was not sufficiently narrowly tailored to the government’s purported objective of holding these broadcasters accountable for their programming. See *Community-Service Broadcasting of Mid-America*, 593 F.2d at 1122.



strong support for the view that the purpose of the recording requirement was related to suppression of free expression on issues of public importance."<sup>214</sup> Judge Wright quoted from the *Congressional Record* statements by the amendment's sponsor, Senator Robert Griffin, insinuating that the recording requirement was instituted in lieu of outright censorship.<sup>215</sup> Judge Wright found such statements revealed that the purpose of the seemingly viewpoint-neutral restriction actually was to exert government control over public broadcasting programming, in clear violation of the purposes of the Public Broadcasting Act and the Constitution.<sup>216</sup>

Judge Wright's analysis rests on the principle that the government cannot impose even a facially neutral condition upon federal funding, if the purpose for imposing the condition is to pressure recipients to alter their programming choices to abide by the preferences of government officials. One of the factors that led Judge Wright to reach the conclusion that the government's purpose was to suppress speech, not simply to hold broadcasters accountable, was that the action in question was taken in response to programming critical of the government's policies.<sup>217</sup>

---

214. *Id.* at 1112. Although the portion of Judge Wright's opinion addressing the plaintiff's First Amendment claims was joined only by Judge Wilkey, the concurring opinions of both Judge Bazelon and Judge Robinson explicitly found Judge Wright's First Amendment analysis "persuasive." *Id.* at 1124 (Bazelon, J., concurring); *id.* at 1126 (Robinson, J., concurring). However, both Judges chose to decide the case on equal protection grounds, thereby avoiding the need to inquire into legislative purpose. *Id.* at 1124-27 (Robinson, J., concurring) (explaining that recording requirement "cannot withstand even more restrained equal protection review, and hence I feel no need to measure it against any more stringent standard"); *id.* at 1123-24 (Bazelon, J. concurring) (recognizing that "the equal protection claim . . . is closely intertwined with First Amendment interests" but because the recording requirement "violates the Equal Protection guarantee . . . it is thus unnecessary to decide whether the chill imposed by this statute is sufficient to require its invalidation on First Amendment grounds alone").

215. *Id.* at 1112-13 (Quoting Senator Griffin telling Hartford Gunn, then-President of PBS: "To avoid any kind of Government censorship, you should make programs broadcast over-the-air available to the public . . ."); see also Chase, *supra* note 93, at 88 (discussing the legislative history and First Amendment implications of the recording requirement).

216. Judge Wright noted:

The legislative purposes of the 1967 Public Broadcasting Act, as stated in the Senate and House Reports, reflect not only a prudential judgment that Congress should not involve itself in the programming decisions of local licensees, but also a constitutional judgment that it must not do so. To the extent that [the recording requirement] rejects this judgment, and was intended instead to impose the threat of congressional or governmental control over the content of non-commercial public affairs broadcasting, it is based upon a purpose which mandates its invalidation.

*Community-Service Broadcasting of Mid-America*, 593 F.2d at 1113-14 (emphasis added). There is a rather striking resemblance between the 1973 recording requirement and the 1992 "objectivity and balance" amendment. Both legislative efforts were ostensibly enacted to ensure accountability to the original 1967 "objectivity and balance" mandate of the CPB. But Judge Wright found the threat of congressional enforcement of this standard—merely by requiring public broadcasters to keep records of their programming—sufficiently chilling to warrant the imposition unconstitutional. In 1992, Congress simply substituted the CPB for the physical recordings required in 1973 as the method by which it could hold producers and broadcasters accountable to the "objectivity and balance" mandate. In 1992, as in 1973, the very threat of enforcement mandates its invalidation.

217. *Community-Service Broadcasting of Mid-America*, 593 F.2d at 1112-13; see also *FCC v. League of Women Voters*, 468 U.S. 364, 387-88 n.18 (1984) (discussing conflicting congressional motivations behind the ban on editorializing, including desire to limit criticism of government).

## “Objectivity and Balance” in Public Broadcasting

The same motivation to squelch speech critical of government policies was at the heart of the 1992 “balance and objectivity” amendment. Congressional criticism of public broadcasting came exclusively from the Republican side of the aisle in the course of a national political campaign.<sup>218</sup> Conservative Republicans, led by Senators Robert Dole, Jesse Helms, Larry Craig, Trent Lott, and Don Nickles, lambasted the programming on PBS. Senator Dole declared “[l]iberals love it. That’s why they are voting for more money. They have their own network.”<sup>219</sup> It was in the wake of such admonitions, and after the Republicans had delayed consideration of the reauthorization bill,<sup>220</sup> that the “objectivity and balance” amendment was introduced on the floor of the Senate.<sup>221</sup> When government imposes new restrictions on those whose speech has been critical of government policy, there is good reason to be suspicious of the government’s asserted purpose.<sup>222</sup> In such cases it is quite plausible that the purpose of the government action is “to suppress dangerous ideas.”

Furthermore, echoing the 1973 congressional statements cited by Judge Wright, members of Congress in 1992 repeatedly indicated that the seemingly innocuous “objectivity and balance” amendment was being imposed in lieu of outright censorship.<sup>223</sup> Senator John McCain (R-Arizona) had earlier stated

---

218. See *supra* note 12 (discussing the statements concerning public broadcasting made at the 1992 Republican National Convention).

219. 138 CONG. REC. S7430 (daily ed. June 3, 1992) (statement of Sen. Dole); *id.* at S7432 (daily ed. June 3, 1992) (statement of Sen. Dole) (listing programs on PBS critical of U.S. foreign policy and investigating the Iran-Contra affair, and then stating, “[i]f you are on the far left and you watch this stuff and you would say, ‘Isn’t this great? They are condemning America, telling us what is wrong with America. . . .’”); *id.* at S2652 (daily ed. Mar. 3, 1992) (statement of Sen. McCain) (“[C]itizen’s tax dollars paid for a six-part series called ‘Imperialist Masquerade,’ which depicted the United States as the leading warmongering entity in the world.”).

220. See *Politics Jeopardizes Public Broadcasting Funds*, NEWS MEDIA & L., Spring 1992, at 52-53 (depicting a year-long battle against the CPB reauthorization waged by conservative congressional critics who were angered by, among other things, NPR’s and PBS’s coverage of the Clarence Thomas hearings and the funding by the CPB and airing on PBS of *Tongues Untied*, which was featured in Pat Buchanan’s presidential campaign commercials). Conservatives offered amendments to cut all funding for the CPB, to impose new “balance in programming” requirements, and to reinstitute annual reauthorizations for the CPB to give Congress greater control. *Id.*

221. 138 CONG. REC. S7341 (daily ed. June 2, 1992) (introducing the “objectivity and balance” amendment on the Senate floor).

222. See, e.g., Dyk & Goldberg, *supra* note 93, at 637-38 n.57 (describing a series of politically motivated letters from members of Congress to PBS complaining of “imbalanced coverage”).

223. See, e.g., 137 CONG. REC. H11,228 (daily ed. Nov. 25, 1991) (statement of Rep. Ritter) (“There needs to be some sort of accountability for PBS, and this is not in any way meant to censor them. . . .”); 138 CONG. REC. S7343 (daily ed. June 2, 1993) (statement of Sen. Stevens) (“Our amendment does not transform the Board of Directors of the Corporation for Public Broadcasting into the censor of the public broadcasting community.”); *id.* at S2650-51 (daily ed. Mar. 3, 1992) (statement of Sen. McCain) (“[A]t the same time that I am concerned about the bias that I have seen time after time, I am not interested in having any political appointees determining what is balanced.”); *id.* at H7268 (daily ed. Aug. 4, 1992) (statement of Rep. Ritter) (“The Senate amendment . . . provides the way through which those [objectivity and balance] goals can be enforced without the unintended intrusion of Government censorship.”); see also Donald Ritter, *Fighting Bias in Public Broadcasting*, ROLL CALL, Apr. 9, 1992 (“By design there is no direct enforcement mechanism for achieving the objectivity and balance mandate in the law creating the PBS. To provide such a mechanism would interject Congress into an unwanted debate over censorship.”).

reservations about such an imposition: "[I]t is not clear to me exactly how we obtain this balance because we would defeat the whole purpose of public broadcasting if we began to impose censorship."<sup>224</sup> The only real difference between the incidents in 1973 and 1992 was the means with which Congress chose to threaten public broadcasting: The 1973 amendment required the stations themselves to keep electronic records of their controversial programming; the 1992 amendment required the CPB to compile a record of controversial programming on public broadcasting stations. Both approaches produce the same result, "to impose *the threat of* congressional or governmental control over the content of non-commercial public affairs broadcasting," and for that reason each is "based upon a purpose which mandates its invalidation."<sup>225</sup>

In sum, the 1992 "objectivity and balance" amendment infringes upon the free expression rights of the CPB, program producers, and broadcasters, and, at the same time, diminishes the vibrancy of public debate. The amendment is insufficiently narrowly tailored to the government objectives it is purported to serve. It also imposes an excessively vague standard that will result in self-censorship and possible discriminatory application. For all of these reasons, the "objectivity and balance" amendment cannot withstand the heightened judicial scrutiny required of a content-based restriction upon a constitutionally protected area of speech. Therefore, the 1992 objectivity and balance amendment should be struck down as unconstitutional.

## V. FULFILLING THE ORIGINAL MISSION OF PUBLIC BROADCASTING

The debate over the role of public broadcasting, and the need for federal support, did not end with congressional approval and President Bush's signing of the 1992 Public Telecommunications Act. Commentators have continued to question whether a public broadcasting system is still needed when the information superhighway promises to deliver upwards of 500 channels via cable.<sup>226</sup> However, cable television is not yet universally accessible, and at no time will all American households be able to afford it.<sup>227</sup> Furthermore,

---

224. 138 CONG. REC. S2652 (daily ed. Mar. 3, 1992) (statement of Sen. McCain).

225. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113-14 (D.C. Cir. 1978) (emphasis added).

226. See Andersen, *supra* note 16, at 75; Jensen, *supra* note 63, at A1; *Executives Warn of PBS Extinction*, N.Y. TIMES, Nov. 18, 1993, at B13 ("Officials of public television warned today that their network could become extinct if it does not change radically.")

227. 138 CONG. REC. S7332 (daily ed. June 2, 1992) (statement of Sen. Dodd):

Conservative critics have also argued . . . that because of the explosion of cable stations across the country, public broadcasting is no longer necessary. But 40 percent of the American public do not have cable television. Public broadcasting stations are available to people who do not have cable. So, while there is an explosion of good broadcasting that is occurring on cable stations, it does not fill the need in many, many homes.

Eighty-six percent of Americans receive public radio broadcasts and 93% receive public television

## “Objectivity and Balance” in Public Broadcasting

even if cable stations were available free of charge to all American households, the need for channels of communication not subject to market pressures would be unchanged.<sup>228</sup>

The modern reality of multiple broadcast and cable channels allows the viewer much greater control over programming than ever before.<sup>229</sup> Nevertheless, all of these offerings are subject to the same limitation: Their primary motivating force is to attract viewers to programming so advertisers can sell products. Thus, there remains as much a need today as in 1967 for a channel of communication that is dedicated to providing information and cultural offerings that would not sustain a profit-making venture.<sup>230</sup>

[I]n a democracy (in contrast to a market), citizens are called upon not simply to consume products but to participate in producing and developing society, its culture, politics and values. Therefore what should distinguish public from commercial television is that public TV is made for citizens not consumers. . . .<sup>231</sup>

As Senator Terry Sanford, a member of the original Carnegie Commission, said on the Senate floor: “Public broadcasting is the one place where program funding decisions are made without regard to marketplace pressures. And I think we should see to it, as intended, that these decisions are made without regard to political agenda pressures.”<sup>232</sup> Unfortunately, as the debate over reauthorization for the CPB in 1992 made all too clear, the current method of providing federal funding for public broadcasting does not sufficiently insulate programming decisions from political pressure.<sup>233</sup> Beginning with the original Carnegie Commission, commentators and policymakers have proposed alternative funding mechanisms and methods for restructuring the relationship be-

---

broadcasts. *Id.* at S7450 (daily ed. June 3, 1992) (statement of Sen. Durenberger).

228. *See id.* at S7322-23 (daily ed. June 2, 1992) (statement of Sen. Wirth) (“Public Broadcasting helps fill the gaps that exist in our commercial broadcasting system, targeting audiences whose needs are not met by commercial broadcasters . . . It does not exist to serve a market and does not face pressure to develop a niche to attract advertisers.”).

229. *See CORPORATION FOR PUB. BROADCASTING, 1992 ANNUAL REPORT* 16 (1993) (describing the fading power of distributors and programmers caused by multiplicity of available channels and the VCR). Between 1987 and 1992, average primetime viewing of public television dropped 17%. Richard Carlson, President and C.E.O. of CPB, Press Conference, Crystal City, Va., (Nov. 17, 1993).

230. *See supra* note 228 (describing unique position of public broadcasting). Perhaps nothing makes this point more clearly than the argument put forth by an *opponent* of taxpayer-funding for public television. According to Robert Knight, director of cultural studies at the Family Research Council, if PBS were subjected to the free market (as he wishes), “then the good stuff would make it, and the pro-Sandinista, pro-Palestinian Liberation Organization, pro-homosexuality stuff would die.” Clark, *supra* note 7, at 815-16.

231. JEFFREY A. CHESTER, *A HERITAGE BETRAYED: FIVE CONFUSIONS*, (1991), *quoted in* Clark, *supra* note 7, at 825.

232. 138 CONG. REC. S2647 (daily ed. Mar. 3, 1992) (statement of Sen. Sanford).

233. *See* 138 CONG. REC. S7472 (daily ed. June 3, 1992) (statement of Sen. Biden) (“Public television reauthorization bills are specifically structured to protect it from these political pressures. We may not all agree with each of the points raised by the documentaries that air on public television, but the alternative of a broadcast network whipped around by political winds would destroy its credibility and support.”).

tween Congress, the CPB, and the public broadcasters to provide greater insulation.<sup>234</sup> All of these proposals deserve further consideration if public broadcasting is to fulfill its role of supplementing commercially driven broadcast speech without becoming either "the government's official channel" or, in the absence of all public funding, subject to the same financial pressures from private underwriters as the commercial networks face from their advertisers.<sup>235</sup>

Furthermore, in order for public broadcasting to fulfill its mandate of supplementing the commercially driven marketplace of ideas, the "balance" that CPB should strive to achieve must not be limited only to programs aired on public broadcasting stations. Rather, CPB should strive to create balance as compared to what *commercial* broadcasters are offering.<sup>236</sup> As Bruce Christensen, past president of PBS has stated eloquently:

The case for public television includes that of being America's town square, *where voices and visions ignored elsewhere in the medium can be seen, evaluated and judged*. . . . Free speech only has meaning in a democracy if the right for all voices to be heard in the most powerful medium of our age is continually affirmed.<sup>237</sup>

---

234. See, e.g., CARNEGIE I, *supra* note 20, at 69 (proposing that CPB be funded through excise tax on television sets to avoid the politics of the congressional authorization process); CARNEGIE II, *supra* note 20, at 66-150 (proposing a National Public Telecommunications Trust and a separate Program Service Endowment, funded in part by a spectrum use fee on commercial broadcasters); Note, *Freeing Public Broadcasting*, *supra* note 123, at 742-47 (suggesting that the presidential power to appoint CPB members be abolished and that funding for public broadcasting be derived from tax credits and/or a spectrum use fee); see also Ben H. Bagdikian, *Television Journalism in the 90s: Stay Tuned, Or Will You?*, 25 TELEVISION Q. 21, 27 (1991) (suggesting British- and Japanese-style equipment tax, and calling for a ban against corporate underwriting of individual programs or series); Henry Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise*, 10 HARV. J.L. & PUB. POL'Y 87 (1987) (suggesting a special tax on gross revenues of commercial broadcasters to support public television, in exchange for freeing commercial broadcasters of "public interest" requirements). But see H.R. REP. NO. 363, 102d Cong., 1st Sess. 8 (1991) (describing failed effort in 1987 to establish a public broadcast trust fund based on spectrum use fees).

235. See Pat Aufderheide, *Are Private Interests Ruling Public Television?*, BUS. & SOC'Y REV., Spring 1989, at 16; Walter Goodman, *Making the Case for PBS (And It's Not So Easy)*, N.Y. TIMES, Dec. 5, 1993, at E1, E40 ("The recent threat by General Motors to reduce its sponsorship of PBS programs because of an unfriendly 'Frontline' documentary brings home the risk of relying on the kindness of corporations."); Jonathan Yardley, *PBS, Forgetting Its First Name*, WASH. POST, Jan. 17, 1994, at B2 ("Over the past couple of decades a system that began as 'educational' TV has become a poor step-sibling of the commercial broadcasters, more interested in competing for ratings points than in fulfilling its ostensible mission.").

236. See 138 CONG. REC. S2647 (daily ed. Mar. 3, 1992) (statement of Sen. Gore) (describing vision of public broadcasting "to make available . . . to all the citizens of this country the kinds of information services on television and radio that are not provided by commercial stations."); see also Bill Moyers, *To The Right-Wingers of "COMINT," Criticizing President "Equals Subversion"*, CURRENT, May 21, 1991, at 19 (arguing that two 90-minute documentaries criticizing Presidents Reagan's and Bush's handling of the Iran-Contra affair are hardly sufficient to provide "fairness and balance" against Oliver North's "five full days before Congress, with wall-to-wall coverage on network, cable and public airwaves, to tell his side of the story").

237. Bruce Christensen, *The Case For Public Television*, in 138 CONG. REC. H7268, H7270 (daily ed. Aug. 4, 1992) (statement of Sen. Beilenson) (emphasis added); see *id.* at H7270 ("[Public television's] agenda is to provide those television services that are essential to this society for its democratic well being."); see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 260 (1961) (arguing that the First Amendment requires that "[i]n every village, in every district of every

## “Objectivity and Balance” in Public Broadcasting

Thus, by requiring the CPB to ensure that public broadcasting programming on controversial issues is “objective and balanced” when compared only to other public broadcasting programs, the 1992 amendment is antithetical to public broadcasting’s mission to serve as the “gap filler” designed to correct for the inadequacies of commercial broadcasting.

## VI. CONCLUSION

The effects of the 1992 “objectivity and balance” amendment remain to be seen. It is not yet clear how the CPB will respond to Congress’s thinly veiled message to change its political perspective.<sup>238</sup> Under the guise of promoting “balance,” Congress actually may have sought to suppress antigovernment speech by forcing the CPB to fund, and broadcasters to present, programs that they believe *Congress* will find “objective and balanced.”<sup>239</sup> Perhaps in the not too distant future, when a program proposal is rejected because it is deemed not properly “balanced” or “objective,” or if a pattern of viewpoint discrimination becomes apparent in CPB grant decisions,<sup>240</sup> someone may bring a suit challenging the CPB’s implementation of the 1992 amendments.<sup>241</sup> Until then, “objectivity and balance” provides Congress and the

---

town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy.”).

238. The letter from National Public Radio to public radio stations encouraging them to curtail controversial programming may indeed be an ominous warning of things to come. *See supra* text accompanying note 15. Furthermore, critics charge that recent public television programming decisions have been made in response to pressure from conservatives. *See* Marc Gunther, *New Shows Stir Debate About PBS’s Politics*, DETROIT FREE PRESS, Feb. 22, 1994, at 1C (noting that CPB “raised eyebrows last month when it voted to underwrite two upcoming programs that appear to have a conservative tilt”); *see also* Frank Rich, *The Plot Thickens at PBS*, N.Y. TIMES, Apr. 17, 1994, at E17 (describing PBS’s decision not to fund the sequel series to Armistead Maupin’s “Tales of the City,” and suggesting that new PBS president Erwin Duggan, a former Bush Administration appointee to the FCC, might be “acting as a censor to appease the fundamentalism and homophobia of family-values kooks”).

239. *See* Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1126 n.13 (D.C. Cir. 1978) (Robinson, J., concurring):

Even were it not menacing to the very heart of the First Amendment to assume that some governmental body should assure the caliber and accuracy of speech, the problem is that broadcasters can only guess what might be labeled “slanted,” and thus “will trim [their] sails to abide the prevailing winds.”

240. *Advocates for Arts v. Thomson*, 532 F. 2d 792, 798 (1st Cir. 1976) (“[I]f the danger of distortion were to be evidenced by a pattern of discrimination” in awarding grants, “a constitutional remedy would surely be appropriate.”).

241. Representatives of concerned public interest groups and broadcasting entities have adopted a wait-and-see attitude toward the CPB’s “objectivity and balance” project. Telephone Interview with Elliott Minceberg, Legal Director, People for the American Way (Apr. 13, 1993). David Salniker, Executive Director of the Pacifica Foundation, has been pleased that thus far the CPB has refrained from reviewing any single program or series of programs. Thus, he believes his organization lacks standing to bring suit challenging the CPB policies. However, Salniker remains highly suspicious of the entire “objectivity and balance” enterprise, suggesting that it is merely an attempt by conservatives to gain greater access for their views on public broadcasting. Telephone Interview with David Salniker, Executive Director, The Pacifica Foundation (Feb. 23, 1994).

CPB grant-reviewers with a vague, undefinable standard through which to serve the government's will.<sup>242</sup>

Whether intended or not, the 1992 "objectivity and balance" amendment to CPB reauthorization will result in a dampening of discussion of controversial issues on public broadcasting. The requirement will force the CPB to squander precious fiscal and human resources pursuing an unattainable objective. Producers and station managers will engage in self-censorship rather than risk financial penalties. Lastly, strict adherence to the "objectivity and balance" requirement as articulated by the CPB will undermine the gap-filling mission of public broadcasting.

Striking the "objectivity and balance" language would leave the CPB with the remaining criteria in the Public Broadcasting Act of 1967: "high quality, diversity, creativity, excellence, and innovation." These criteria are eminently more consistent with the constitutional mission of public broadcasting—to supplement the range of views available in the commercial broadcast landscape and thereby produce an enriched public debate that is truly "robust, wide-open, and uninhibited."

---

242. "[The CPB] will continue to address both real *and perceived* problems as they are brought to our attention through responsible communication." 1994 CPB REPORT TO CONGRESS, *supra* note 94, at 18 (emphasis added).